Supreme Court, U.S.
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No.

In the

Supreme Court of the United States

MANUEL A. BARALT and JUAN GONZÁLEZ,
Petitioners,

v.

NATIONWIDE MUTUAL INSURANCE COMPANY,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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83 pp

QUESTION PRESENTED

Until June 2000, when *Reeves v. Sanderson Plumbing Products, Inc.* ("Reeves"), 530 U.S. 133, 120 S. Ct. 2097, 147 L.Ed.2d 105 (2000), was decided, a conflict existed among the Courts of Appeal on the nature of plaintiff's burden of proof in age discrimination cases pursuant to federal law. The issue was whether a plaintiff's *prima facie* case of discrimination combined with sufficient evidence for a reasonable factfinder to reject the employer's non-discriminatory explanation of its decision to terminate the employment is adequate, without more, to sustain a finding of liability. Some Courts of Appeal held that additional evidence of intentional discrimination was required (the "pretext plus" standard in the First Circuit). In *Reeves*, the Court rejected the "pretext plus" standard.

The instant case, a case in which the District Court's jurisdiction is founded on 28 U.S.C. § 1331 since claims were filed pursuant to the Age discrimination in Employment Act of 1967 (the "ADEA"), the First Circuit adopted what it understood is the standard under Puerto Rico's anti-discrimination law, a "pretext plus" standard, and projected such standard to the federal claim of intentional age discrimination arising from the ADEA. As a result, a judgment as a matter of law for Respondent pursuant to Rule 50 of the Federal Rules of Civil Procedure was issued reversing the factfinder's conclusions that Respondent intentionally discriminated against Petitioners on account of age. The question presented is therefore: Should *certiorari* be granted, the judgment vacated and a judgment for Petitioners be directed pursuant to the standard established in Reeves regarding the claimant's burden of proof in a federal age discrimination case and on the issuance of a judgment as a matter of law?

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PETITION FOR A WRIT OF CERTIORARI

Manuel A. Baralt and Juan González (Petitioners) respectfully petition for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the First Circuit in this case.

OPINIONS BELOW

The orders of the United States District Court for the District of Puerto Rico denying Respondent post trial Motion for a Judgment According to Law and for a Remittitur is reported at 86 F. Supp. 2d 31 (D.P.R. 2000). The Order Granting Attorney Fees (*id.* at 40a-51a) is unreported. The First Circuit's Order reversing the judgment on the age discrimination claims and the award of attorney fees, vacating said portions of the judgment and remanding is reported at 251 F.3d 10 (1st Cir. 2001). The Court of Appeals order denying rehearing and the suggestion that the rehearing be held *en banc* (*id.* 53a-54a) is unreported.

JURISDICTION

Statutory basis for jurisdiction. The District Court had jurisdiction over Petitioners' complaint under 28 U.S.C. § 1331 and 28 U.S.C. § 1367. The Court of Appeals had jurisdiction under 28 U.S.C. § 1291. Petitioners invoke the Court's jurisdiction under 28 U.S.C. § 1254(1).

The First Circuit issued its opinion in this case on May 24, 2001. On August 24, 2001, the First Circuit denied a rehearing and a rehearing *en banc*.

STATUTORY PROVISIONS INVOLVED

Petitioners alleged in their complaint that the Respondent terminated their employment in violation of the Age Discrimination in Employment Act (the "ADEA"), 29 U.S.C. § 621-634 and Puerto Rico Law 100, P.R. Laws Ann. tit. 29, § 146-51 ("Law 100").

ADEA provides in 29 U.S.C. § 623 (A)(1) as follows:

> It shall be unlawful for an employer –
>
> (1) to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age;

Puerto Rico's Law 100 provides in P.R. Laws Ann. tit. 29, § 146(a)(1), (2) and (3), as follows:

> Any employer who discriminates against an employee regarding his salary, wage, pay, remuneration, terms, rank, conditions, or privileges of his/her job, or who fails or refuses to hire or rehire a person, or who limits or classifies his/her employees in any manner which tends to deprive a person of employment opportunities, or to affect his/her status as employee because of his/her age, as defined below, race, color, sex, social or national origin, social condition, political or religious beliefs of the employee or applicant for employment:
>
> (a) shall incur civil liability
>
> (1) for a sum equal or twice the amount of damages sustained by the employee or

applicant for employment on account of such action;

(2) or for a sum of not less than one hundred (100) nor more than one thousand (1,000) dollars, at the discretion of the court, if no pecuniary damages are determined;

(3) or twice the amount of damages sustained if such amount is under the sum of one hundred (100 dollars....

STATEMENT OF THE CASE

This case arose as a result of Respondent's termination of employment of two of its highest ranking and more senior employees in the Puerto Rico regional operation. The basis for the federal jurisdiction in the court of first instance was 28 U.S.C. § 1331 since claims of intentional age discrimination under the ADEA were filed. Supplemental jurisdiction over the causes of action pursuant to the laws of Puerto Rico was invoked pursuant to 28 U.S.C. § 1367.

At the time of Petitioner's firings in 1994, they were respectively sixty and forty-nine years old and had worked for the Respondent consecutively during the previous 28 and 25 years. Prior to their dismissals, the Petitioners were regularly commended for their work performance and had been given regular promotions and pay raises. As a result, Petitioners were at the time of their summary dismissals members of a six person "Cabinet" of Respondent's regional operation in Puerto Rico, i.e., the senior managers of the Puerto Rico operations.

Petitioners' termination of employment was both sudden and summary even though they had never before been disciplined or reprimanded. Around that time, the employment of two other members of the Cabinet who, as the Petitioners, were within the ADEA's protected age group,

were also terminated: (1) Mr. Enrique López, the General Manager, and Mr. Luis Flores Dieppa, the Comptroller. Within months, the other two remaining members of the "Cabinet," who were also in the ADEA's protected age group, ceased working for the Respondent.

At the trial the Respondent did not offer any evidence concerning the age of the persons that became members of the new "Cabinet" although evidence was submitted proving that never before in the Respondent's operational history had an entire "Cabinet" of a regional operation been replaced in such a short span of time. At the time of these events, the Respondent was implementing an early retirement plan.

Petitioner González, the sixty year old employee, was replaced by a 43 year old person and Petitioner Baralt was initially replaced by a person approximately two years his junior; but shortly thereafter by a "much younger" person.[1]

Each Petitioner filed a complaint in which, among others, they asserted two causes of action. One cause of action pursuant to the Age Discrimination in Employment Act of 1967, as amended, 29 U.S.C. § 623(A)(1) (the "ADEA") and a cause of action pursuant to Puerto Rico's anti-discrimination statute.

After a six-day trial in which Respondent raised no objections to the jury's instructions, the factfinder, through a special verdict form, concluded that Petitioners proved that age was a factor that made the difference in the decision to terminate their employment in violation of the ADEA; and that they were also terminated in violation of Puerto Rico's anti-discrimination statute. The jury found that Petitioner González had an entitlement to back pay in the amount of $400,000.00 and compensatory damages in the amount of $1,500,000.00. Petitioner Baralt, pursuant to the jury's

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[1]The Respondent never offered any evidence regarding that person's age.

findings, had an entitlement to $500,000.00 in back pay and $1,000,000.00 in compensatory damages.

After an extended consideration of Respondent's Motion for a Judgment NOV or for a Remittitur, on February 23, 2000 the District Court denied the motion; and therefore sustained the back pay awards. The Court also doubled the amount of each Petitioner's award of compensatory damages pursuant to the provisions of Puerto Rico's anti-Discrimination Act.

In its February 23, 2000 Opinion and Order issued before the Court's *Reeves v. Sanderson*'s decision, the District Court considered at length Respondent's proffered non-discriminatory reasons for terminating Petitioners' employment. The Court concluded: "The jury disbelieved Nationwide's allegations, and the Court cannot substitute its judgment for that of a jury's, when, as here, the jury's finding is amply supported by facts." On May 8, 2000, the District Court awarded to Petitioners' attorney fees in the amount of $141,826.25 for 1,047 billable hours, derived via the "lodestar" method. Respondent appealed to the Court of Appeals for the First Circuit. Petitioners cross appealed.

The Court of Appeals reversed the judgment on the claim of age discrimination and the award of attorney fees because it believed that Respondent was entitled to a judgment as a matter of law pursuant to Rule 50 of the Federal Rules of Civil Procedure. The Court of Appeals believed that Respondent "met its burden to demonstrate, by a preponderance of the evidence" that Petitioners "were not fired on account of age."

The Court of Appeals reached its decision without giving any consideration whatsoever to the ADEA or this Court's Opinion in *Reeves v. Sanderson* because:

> The parties agree that, if we were to conclude that plaintiffs are not entitled to recover under Law 100 [Puerto Rico-s Anti-Discrimination Act], they also would have failed to prove age discrimination under the ADEA because Law 100 offers a 'significantly more favorable' standard to plaintiffs than does the ADEA.... Our analysis therefore begins with Law 100, and, because we conclude that plaintiffs have not shown a violation of that statute, it also ends there.

Baralt v. Nationwide Mut. Ins. Co., 251 F.3d 10, 16 (1st Cir. 2001).

The Judgment according to law was granted even though the Court of Appeals had concluded:

> Nationwide's rationale for the firings ... was far from compelling. Taken in the light most favorable to plaintiffs, the company's position was that the two men – each with more than two decades of apparently high quality service to the company – were terminated summarily for (1) their peripheral involvement in a series of improper but relatively minor acts in which their boss and other employees had taken advantage of the company, and (2) their discussions with co-workers, in violation of instructions about the investigation into those improper acts. Moreover, as we noted earlier, the circumstances surrounding the terminations executed by Lucas give every appearance of an insensitive overreaction to a series of minor transgressions.[2]

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[2]Petitioners specifically denied their alleged involvement even in minor transgressions or that they violated any instruction. At best, Respondent's evidence is inconclusive and was rejected by the jury.

> We have no problem accepting that a jury reasonably could conclude that a large, reputable company would not act as precipitously as Nationwide could be found to have acted if its actual concern were the minor transgressions that it claimed underlay the terminations. In other words, we think the jury was entitled to disbelieve Nationwide's stated reasons for the firings. Our problem, rather arises from the absence of evidence that would permit a conclusion that the actual reason for the firings was plaintiffs' ages. For, even in the face of Law 100's presumption, we conclude that the evidence presented by Nationwide, in the context of the evidence presented by plaintiffs, was sufficient to meet its burden under Law 100 to demonstrate that 'the existence of discrimination was less probable than its nonexistence,' *Belk Arce v. Martinez*, 98 J.T.S. 92 (P.R. 1998), Official Translation at 16.

Baralt, F.3d at 17-18.

Since the Court of Appeals' analysis of Puerto Rico's Act 100 is based on an erroneous "pretext plus" standard, the extension of that reasoning to the ADEA claims is a *de facto* refusal to follow this Court's binding precedent in *Reeves v. Sanderson Plumbing Products*. Moreover, as is noted further on in the argument, the Court of Appeals also erred in the application of federal law with respect to the issuance of a judgment according to law, a matter that was also decided contrary to *Reeves*.

I. Petitioners' Evidence at Trial Established Respondent's Intentional Discrimination on Account of Age.

Admittedly, Petitioners had no direct evidence of age discrimination. This case, as in most similar cases, "the question facing triers of fact ... is both sensitive and difficult" because [t]here will seldom be 'eyewitnesses' testimony as to the employer's mental processes," *Postal Service Bd. Of Governors v. Aikens*, 460 U.S. 711, 716, 75 L.Ed.2d 403, 103 S. Ct. 1478 (1983). As a result, Petitioners relied at trial on circumstantial evidence as permitted by the analytical framework formulated in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 36 L.Ed.2d 668, 93 S. Ct. 1817 (1973).

In order to establish a *prima facie* case, Petitioners proved that: (1) they were members of the class protected by the ADEA since they were over forty years of age at that time; (2) that they were qualified for the positions they were employed at; (3) that they were discharged by the Respondent; and (4) that Respondent successively hired other persons to fill the jobs performed by the Petitioners. The replacements were younger than the Petitioners.

In addition, Petitioners proved the following: (1) at the time of the discharges, Respondent was implementing an early retirement plan; (2) Petitioners were given the option of taking early retirement in lieu of a dismissal; (3) that the stark choice between taking an early retirement or be fired was made without even a review of Petitioners' employment record; (4) that the person who actually made the decision to fire the Petitioners (Lucas) intentionally decided not to review their employment records so that it could not be alleged that he discriminated on account of age; (5) that Lucas was sent to Puerto Rico from the Respondent's headquarters with sufficient authority to fire employees in Puerto Rico before a full investigation was conducted; (6) that although Petitioners were ostensibly discharged for

obstructing an internal investigation of wrongdoing, Respondent had not terminated any employee on such account anywhere before the firings of the Petitioners; (7) that concurrently with Petitioners' discharges, two other senior officers in the protected age were summarily discharged; (8) that the other two remaining senior officers of Respondent's Puerto Rico operation retired shortly after the Petitioners' dismissals; (9) that this is the only instance in Respondent's history that an entire "Cabinet" of a region, all in the protected age by the ADEA, had been fired or ceased working for Respondent within a short time of each other; (10) no evidence was produced by Respondent as to the age of the members of the "Cabinet" that replaced the one in place when Petitioners worked for the Respondent; (11) the alleged investigation that lead to Petitioners' dismissals was superficial, incomplete, seriously flawed and based in uncorroborated hearsay and unfounded speculation,[3] and (12) that Petitioners were terminated without a just cause, a finding expressly made by the jury.

The Court of Appeals chastised the District Court for citing as support for the jury's finding of intentional age discrimination Respondent's concurrent implementation of a company-wide retirement plan at the time of Petitioners' employment termination ("As we have elsewhere observed, an offer of early retirement is not, on its own, evidence of discriminatory animus. *See Alvarez-Fonseca v. Pepsi Cola Bottling Co.*, 152 F.3d 17, 27 (1st Cir. 1998); *Vega v. Kodak Caribbean Ltd.*, 3 F.3d 476, 480 (1st Cir. 1993)." *Baralt*, 251 F.3d at 16, n.7.

We do not contest that an offer of early retirement for older employees is not, on its own, evidence of a discriminatory animus. In this case, however, the

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[3]Incredibly, the investigation was started by Manuel Baralt, one of the Petitioners, who suspected that Respondent employees in Puerto Rico were engaging in misdeeds.

uncontradicted evidence proved that the Respondent used the early retirement plan to confront the Petitioners with a crude and stark choice: they could take early retirement or they would be fired.

This use of the early retirement plan by the Respondent in such a threatening environment, together with the other circumstantial evidence of discrimination, Petitioners' *prima facie* showing and the total disbelief by the jury of the Respondent's non-discriminatory proffer, may have loomed large on the factfinder that had to determine the Respondent's animus when it fired the Petitioners.

Even the First Circuit has recognized in the past that the choice presented to Petitioners is "an impermissible take-it-or-leave-it choice between retirement or discharge." *Vega v. Kodak Caribbean, Ltd.*, 3 F.3d 476, 480 (1st Cir. 1993); *Herbert v. Mohawk Rubber Co.*, 872 F.2d 1104, 1113 (1st Cir. 1989). In such circumstances, absent a clear directive from this Court, the existence of the early retirement plan was properly before the jury together with the other circumstantial evidence.

II. Respondent's Articulated Non-Discriminatory Reasons for the Discharges.

A. Allegations as to Petitioner González.

In the discharge of its obligation pursuant to the shifts in the burden of proof resulting from the *McDonnell Douglas* analytical framework, the Respondent articulated the following legitimate non-discriminatory reason for the discharges. It alleged that Petitioner González: (1) filed an insurance policy application for a Plymouth "Sundance" automobile owned by Enrique López, Respondent's General Manager in Puerto Rico, in which he falsely stated that the principal driver would be Mr. López's wife instead of Mr. López's son. In addition, it was alleged that

Respondent's Puerto Rico operation could not insure a car that was going to be operated in Ohio or any other state; (2) that he failed to protect company property by allowing a salvage car (a British Sterling) to be driven and to be garaged at the General Manager's second home; (3) permitted the General Manager's son to drive a company pool car; and (4) interfered with an investigation.

Petitioners proved at trial that the Respondent's proffered reasons to dismiss Mr. González were false by proving: (1) that he provided truthful information in an internal memorandum with regards to the identity of the person who would be the principal driver of the Plymouth "Sundance" and where the automobile would be driven (in Ohio). Said memorandum was admitted in evidence and was not controverted by the Respondent. The Petitioner also proved at trial that the insurance policy on the Plymouth "Sundance" was originated by a department at Respondent's operation in Puerto Rico that Mr. González did not control. In fact, it was proven that the head of the department that issued the policy was Mrs. Blanca Robles, one of the other two members of the old "Cabinet" that the Respondent did not fire. In addition, it was proven that upon Mrs. Robles' retirement from the Respondent's employment, on account of accepting an early retirement, the Respondent assigned to her a pool of company policies for her to handle as an insurance agent. Among the policies assigned to Mrs. Robles was the "Sundance" policy. That policy, the evidence at trial revealed, was renewed by the Respondent after Mr. González was fired; (2) with respect to the British Sterling automobile, it was proven at trial that Mr. González had nothing to do with the decision to park the Sterling automobile at the General Manager's second home. All he did, pursuant to the directives he received from his superior, was to drive the car back to the City of San Juan when said car was sold to a third party; (3) with respect to the company's pool car that was driven by the General Manager's son, it was proven at the

trial that said car was not in the custody or control of Petitioner González's department. The pool cars were under the custody and control of Mr. Rafael González, one of the two "Cabinet" members that the Respondent did not fire and that took early retirement shortly after the Petitioners were fired. It was also proven at the trial that the incident of having someone who is not a company employee drive a company's pool car was not prohibited by any company policy in Puerto Rico or the Continental United States, that the incident took place more than two years before Mr. González was fired, that said incident was known to everyone at the Puerto Rico operation, and that the reason for allowing the General Manager's son to drive the pool car at night to his home was to protect the car since the company's office was located in a crime infected area of the City of San Juan and the compound was not fenced at the time. The practice of having a third party not employed by the company drive a pool car ceased when the Respondent's compound was fenced; (4) with respect to the allegations that Mr. González interfered with an ongoing investigation, the evidence submitted at the trial revealed that the Respondent was unable to produce any witness with personal knowledge who could testify that Mr. González interfered with the internal investigation, an allegation that Mr. González vehemently denied under oath. In any event, the Respondent did not prove at the trial that Mr. González's alleged interference impeded or affected the investigation in any way.

B. Petitioner Baralt:

Respondent articulated the following non-discriminatory reasons for terminating Mr. Baralt's employment: (1) he did not protect the company property when he allowed company employees to purchase salvage vehicles without paying for them; and (2) he impeded an investigation by telling an employee to lie to the investigator.

At trial it was established that: (1) Mr. Baralt had nothing to do with the sale of salvage automobiles to Respondent employees. Indeed, when Mr. Baralt was fired, Respondent operated under the clearly erroneous impression that the company books did not reflect the employees' debt on account of the purchase of salvage vehicles. The books did reflect that credit. The evidence at trial also revealed that neither Petitioner ever purchased a salvage vehicle from the Respondent. Indeed, the evidence proved that Mrs. Robles, one of the members of the "Cabinet" who was not fired, had a practice of purchasing salvage vehicles from the company. Moreover, the evidence at trial revealed that at the time that Mr. Baralt was fired, the company's comptroller was actively collecting the money owed by the employees who purchased salvaged vehicles on credit; and (2) with regards to the allegation that Mr. Baralt told an employee to lie to the investigator, the evidence at trial showed that said allegation was based on inadmissible hearsay since the Respondent presented no witness with personal knowledge to sustain the allegation. Moreover, Baralt vehemently denied under oath at the trial that he told anyone to lie to the investigator. His testimony remains unimpeached by anyone with personal knowledge willing to testify under oath.

In short, each and every allegation of wrongdoing by Petitioners presented by the Respondent to justify Petitioners' discharges was challenged at trial and proven to be false and a pretext to justify the discharges.

In light of the evidence presented at trial, the jury, as it was entitled to, disbelieved Respondent's reasons for firing the Petitioners and "infer[red] from the falsity of the explanation that the employer [was] disassembling to cover up a discriminatory purpose." "[O]nce the employer's justification [was] eliminated, discrimination may well be the most likely alternative explanation, especially since the employer is in the best position to put forth the actual reason

for its decision." *Reeves v. Sanderson Plumbing Products*, *supra*, at L.Ed.3d 120.

The jury's inference of discrimination was more than justified inasmuch as the only investigator that testified at trial: (1) did not know what procedures were being followed by the regional office in Puerto Rico; (2) saw no regulation in Puerto Rico relating to the use of pool cars; (3) had no knowledge whether Respondent's compound in Puerto Rico was located in a crime infected area, whether cars had been stolen or vandalized in the compound, whether carjackings had taken place there, nor when the compound was fenced; (4) admitted that all she found out about Mr. González in regards to the Sterling car was that Mr. González drove it to San Juan pursuant to directives issued by his supervisor; (5) did not know of and had not read Mr. González's memorandum in which he stated that the principal operator of the Plymouth "Sundance" would be the General Manager's son and not his wife; (6) did not know whether the Puerto Rico operation could insure a car that would be driven in one of the states; (7) did not know that the Plymouth Sandance's policy had been renewed after the Petitioners were fired; (8) had not checked the company's records or job descriptions to determine the areas of responsibility of the managers, including the Petitioners; (9) had never before investigated salvage operations; and (10) had no knowledge of the Respondent ever having terminated an employee on account of an alleged breach of confidentiality during an investigation.

REASONS FOR GRANTING THE WRIT

The decision below decided important questions of federal law in a way that conflict with this Court's relevant decision in *Reeves v. Sanderson Products, Inc.*

1. Court of Appeals Applied the Wrong Standard.

As the Fifth Circuit did in *Reeves*, the First Circuit here believed that although a reasonable jury could find, as it evidently did in this case, that the employer's explanations for Petitioners' discharges were pretextual or a sham, that showing, the evidence of a *prima facie* case and the additional circumstantial evidence presented by the Petitioners was insufficient as a matter of law to sustain the jury's finding of liability. The Court of Appeals required what amounts, for all practical purposes, direct evidence of age discrimination.

In footnote 11 of its opinion (*Baralt*, F.3d at pp. 19-20), the Court of Appeals stated:

> The strength of Nationwide's evidence of a legitimate investigation distinguishes this case from *Reeves v. Sanderson Plumbing Prods., Inc.* (citations omitted), in which the Supreme Court upheld a jury's finding of an ADEA violation on plaintiff's *prima facie* case and 'sufficient evidence for a reasonable factfinder to reject the employer's non-discriminatory explanation for its decision. Although Law 100 differs from the ADEA in that the defendant bears the burden of disproving discrimination, the factors we consider in assessing the evidence are the same: the strength of the plaintiff's *prima facie* case, the probative value of the proof that the employer's explanation is false, and any other

> evidence that supports the employer's case and that properly may be considered on a motion for judgment as a matter of law....

The Court of Appeal's comments in the footnote comes to light when at pages 18 and 19 of the Baralt opinion the Court stated "Plaintiffs presented no evidence to discredit the authenticity of the investigation." "In sum, with virtually no evidence besides the discharges themselves pointing to age as a factor and none indicating that the investigation was fabricated by company officials to conceal other motives, a reasonable jury could not entirely reject the company's abundant evidence that the terminations stemmed, however unwisely, from the investigation."

On the record before the Court of Appeals it is patently incorrect to state that Petitioners presented no evidence to discredit the authenticity of the investigation. Petitioners went beyond that. They controverted as factually false and unreliable each and every allegation raised by the Respondent in its attempts to articulate a non-discriminatory reason for the firings. After all the evidence was admitted, the trier of fact had a case in which it had to adjudicate the credibility of the witnesses and had to weigh the evidence presented. When the jury discharged its duty, pursuant to a charge that was not objected to, it was entitled to not believe the Respondent's proffered explanations. After all, the evidence proved that the investigation was so inadequate and had so many holes, that it had no probative value to the factfinder.

The First Circuit's extraordinary reliance on Respondent's investigation is nothing but, we respectfully submit, a red herring to mask the true reasons for the judgment as a matter of law: (1) the usurpation of the proper role of a jury; and (2) the reintroduction of a "pretext plus" standard to age discrimination cases. Both reasons run counter to the *Reeves* opinion.

2. Jury's Role and Rule 50 Standard.

While in entertaining a motion for a judgment as a matter of law, the Court should review all the evidence in the record, must draw all reasonable inferences in favor of the non-moving party, and it may not make credibility determinations or weigh the evidence.

> Credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge. (Citations omitted.) Thus, although the court should review the record as a whole, it must disregard all evidence favorable to the moving party that the jury is not required to believe. See Wright & Miller 299. That is, the court should give credence to the evidence favoring a nonmovant as well as that 'evidence supporting the moving party that is uncontradicted and unimpeached, at least to the extent that the evidence comes from disinterested witnesses.

Reeves, L.Ed.3d at 122.

In the instant case, the record reflects that Respondent offered no evidence from disinterested witnesses and that the totality of Respondent's evidence was impeached, specifically each and every finding in Respondent's investigation.

The above notwithstanding, the Court of appeals took upon itself to usurp the jury's functions and decided that it would make inferences from the facts, would assess credibility, would weigh the evidence and would speculate – beyond the scope of the evidence on the record – about the Respondent's motivations for firing the Petitioners. The Court of Appeal's decision is most revealing:

> While, as we have noted, the callous severity of the punishment in all likelihood moved jurors to doubt that the discharges occurred for the stated reasons, the evidence was substantial that the firings were in some way a by-product of the home office probe into the Puerto Rico operations. On this record, various investigations – related explanations for terminating plaintiffs were much more likely than the completely unsubstantiated age bias asserted by plaintiffs: Nationwide may have sought to clean house at the highest levels of NPRO's management after concluding that 'business as usual' there did not satisfy the company's standards; it may have interpreted reports from McGoldrick as well as the auditors as indicating a widespread laxness and invitation to corruption that had to be wiped out; the company may have decided to terminate any manager who failed to comply fully with the investigations as a show of authority to assure fidelity on the part of branch supervisors; the Human Resources officer, Lucas, may have felt the need to justify the time and expense of the investigation by terminating a sufficiently large number of employees, whether or not they in fact committed wrongdoing, or he may simply have lost perspective and acted harshly. None of these reasons would support liability under Law 100 [nor under the ADEA].

Baralt, F.3d at 18-19.

Evidently, the Court of Appeals, when it considered the evidence as a whole, did exactly the opposite of what it could do as stated in *Reeves*. The Court of Appeals not only

supplanted the jury's role, but it drew all inferences, legitimate or not, in favor of the moving party.

In its disregard of its proper role in deciding a motion according to law, the Court of Appeals articulated and speculated on legitimate non-discriminatory reasons for firing the Petitioners that were never raised by the Respondent and are devoid of any evidentiary support. Such reasoning may be proper in certain circumstances to affirm a jury's decision. It is entirely improper when it is employed to overturn and supplant the jury's role since it is precluded by the provisions of the Seventh Amendment. *Atlantic Gulf Stevedores v. Ellerman Lines*,.369 U.S. 355, 358, 359; 7 L.Ed. 2d 298, 803; 82 S. Ct. 780 (1962) ("[N]either we nor the Court of Appeals can redetermine facts found by the jury any more than the District Court can predetermine them. For the Seventh Amendment says that 'no fact tried by a jury, shall be otherwise reexamined in any court of the United States, than according to the rules of the common law.")

This is not a case that when examined on the record before the Court entitles an employer to a judgment as a matter of law on account that:

> The record conclusively revealed some other non-discriminatory reason for the employer's decision, or if the plaintiff created only a weak issue of fact as to whether the employer's reason was untrue and there was abundant and uncontroverted independent evidence that no discrimination had occurred.

Reeves, L.Ed.2d at 120.

On the contrary, we are facing a case in which a strong *prima facie* case of age discrimination was presented and the Respondent's articulated non-discriminatory reasons to justify the firings were not believable and were not believed by the trier of fact, were not uncontroverted and the

Respondent's allegations were not supported by any independent evidence.

Contrary to the Court of Appeals' belief, this is not the type of case in which there was no legally sufficient evidence on which the jury could hang its hat. The evidentiary predicate was present and was legally sufficient to isolate the verdict from a judgment according to law. On that account the jury's reversal should be overturned.

3. The Renewal of the Pretext Plus Standard.

In *Reeves*, L.Ed.2d at 115, this Court noted that when it decided *Woods v. Friction Materials, Inc.*, 30 F.3d 255 (1st Cir. 1994), the First Circuit joined the other Circuits that understood that for a plaintiff to prevail in an age discrimination case pursuant to the ADEA it had to introduce sufficient evidence for the jury to find that the employer proffered non-discriminatory reason was false and that the real reason for the termination of employment was discrimination *vel non*. That standard was known as the "pretext plus." In *Reeves* this Court decided that "pretext plus" was no longer an appropriate standard to determine the existence of discrimination. As a result, the discretion of the Courts to issue judgments as a matter of law was severely curtailed.

As we noted earlier, in *Baralt* at p. 16, the Court of Appeals decided that it would suffice to decide the federal claims of age discrimination by merely determining if Petitioners could prevail on the cause of action asserted pursuant to Puerto Rico's anti-discrimination statute. If the Petitioners could not prevail in the cause of action of such "significantly more favorable" standard, then they could not prevail in the ADEA's cause of action.

As a result, the Court of Appeals did not independently apply the federal standard on age

discrimination to Petitioners' causes of action pursuant to the ADEA. In effect, the Court of Appeals did not pass judgment on the merits of the causes of action under federal law that gave the Court of first instance subject matter jurisdiction. The Court's analysis began and ended on the claims entertained pursuant to the Supplemental Jurisdiction Statute.

In its analysis of Puerto Rico anti-discrimination statute the Court of Appeals concluded as follows:

> We have intently scrutinized the Puerto Rico cases cited to us to see what light they shed on a record bereft of indicia of discriminatory intent as this. In every case we have examined, there was discriminatory intent beyond the allegations necessary to make a *prima facie* case of discrimination. In *Casto Soto v. Hotel Caribe Hilton* [citation omitted], the court noted that plaintiff not only had rebutted the employer's proffered reason for termination, but also had submitted evidence of the dominating presence of under-40 personnel and the company's efforts to create unfavorable disciplinary records for its older employees. In *Belk Arce* [citations omitted], there was a consultant's report indicating anti-marriage animus within the defendant law firm, as well as a partner's specific anti-marriage statement referring to plaintiffs. In *Sandoval v. Caribe Hilton* [citation omitted], the plaintiff introduced evidence that new management had instructed supervisors to exert pressure on older workers to retire.

Baralt, F.3d at 20.

Although the Puerto Rico cases cited by the Court of Appeals had proven facts that exceeded a plaintiff's *prima facie* case and proof of the falsity of defendant's proffered explanations, at no time has the Supreme Court of Puerto Rico held, as the Court of Appeals seems to suggest, that Puerto Rico anti-discrimination statute operates pursuant to a "pretext plus" standard.

While Law 100, as the ADEA, rely on circumstantial evidence in most cases for proving the existence of intentional age related discrimination, pursuant to Law 100, an allegation of intentional age discrimination and proof of any one (1) of the ADEA's *prima facie* case elements unleashes a presumption of discrimination. The employer must then prove through the preponderance of the evidence that it did not intentionally discriminate on account of Petitioners' age. Thus, contrary to the ADEA, pursuant to Law 100, the ultimate burden of production and of persuasion rests on the employer. *Sandoval v. Caribe Hilton Int'l*, 99 J.T.S. 161 (P.R. 1999); *Belk Arce v. Martínez*, 98 J.T.S. 92 (P.R. 1998); *López Vicil v. ITT Intermedia, Inc.*, 142 D.P.R. 857 (1997); *Casto Soto v. Hotel Caribe Hilton*, 137 D.P.R. 294, 1994 WL 909663 (1994); *Ibañez v. Molinos de Puerto Rico, Inc.*, 114 D.P.R. 42, 1983 WL 20424 (1983).[4]

As a result of the presumption of intentional discrimination and the shift to the employer of the burden of proof to prove that it did not discriminate, it is impossible for Puerto Rico to be a "pretext plus" jurisdiction as intimated by the Court below. That interpretation of Commonwealth law defies the landmark standard established in *Erie R. Co. v.*

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[4]In this case, contrary to the Court of Appeal's understanding that the Respondent "met its burden [under Puerto Rico's law] to demonstrate, by a preponderance of the evidence" that Petitioners "were not fired on account of age," the jury, who could assess credibility and who could weigh the evidence, having been properly charged, found exactly the opposite.

Thompkins, 304 U.S. 64, 58 S. Ct. 817, 82 L.Ed. 1188 (1938).

The important issue of federal law arising from the Court of Appeals' decision is that by extending the alleged "pretext plus" standard arising from Puerto Rico's laws to the federal action pursuant to the ADEA, the lower Court did not follow the *Reeves* standard relating to plaintiffs' burden of proof in an age discrimination case. In effect, the Court of Appeals revived in this case the "pretext plus" standard in the analysis of federal law. That opened the door for an improper judgment according to law, overturning a verdict that could not be overturned, if the proper standards had been applied.

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be granted, the judgment vacated and a judgment issued for Petitioners on the intentional age discrimination causes of action and the award of attorneys fees.

Respectfully submitted.

In San Juan, Puerto Rico,
this 21st day of November, 2001.

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(any footnotes trail end of each document)
Nos. 00-1453, 00-1741, 00-1742, 00-2107

UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

MANUEL A. BARALT; LIZETTE PENA-AVILES; CONJUGAL PARTNERSHIP BARALT-PENA; JUAN GONZALEZ-PEREZ; MONSERRATE CANABAL-DURAN; CONJUGAL PARTNERSHIP GONZALEZ-CANABEL,
Plaintiffs-Appellees/Cross-Appellants,

v.

NATIONWIDE MUTUAL INSURANCE COMPANY,
Defendant-Appellant/Cross-Appellee,

NATIONWIDE INSURANCE COMPANY; NATIONWIDE MUTUAL FIRE INSURANCE COMPANY; NATIONWIDE LIFE INSURANCE COMPANY; NATIONWIDE GENERAL INSURANCE COMPANY; NATIONWIDE PROPERTY AND CASUALTY INSURANCE COMPANY; NATIONWIDE GROUP OF COMPANIES; WILLIAM P. DEMENO,
Defendants.

May 24, 2001, Decided

PRIOR HISTORY:
APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF PUERTO RICO. Hon. Juan M. Perez-Gimenez, U.S. District Judge.

DISPOSITION:
Judgments for plaintiffs on the age discrimination counts reversed, the award of attorney's fees vacated, and the case

remanded for further proceedings as necessary to enter judgment in connection with the claim for unjust dismissal under Law 80.

COUNSEL:
Sheldon H. Nahmon, with whom Arturo Diaz-Angueira and Roberto Feliberti were on brief, for Nationwide.

Ruben T. Nigaglioni, with whom Antonio A. Arias-Larcada was on brief, for appellees/cross-appellants.

JUDGES:
Before Selya, Circuit Judge, Coffin and Campbell, Senior Circuit Judges.

OPINIONBY:
COFFIN

OPINION:

COFFIN, Senior Circuit Judge. A jury found that appellant Nationwide Mutual Insurance Company ("Nationwide") terminated appellees Manual Baralt and Juan Gonzalez-Perez ("Gonzalez") because of their ages, in violation of both the Age Discrimination in Employment Act, *29 U.S.C. § § 621*-634 ("ADEA"), and Puerto Rico Law 100, P.R. Laws Ann. tit. 29, § § 146-51 ("Law 100"). The two men and their wives were awarded a total of more than $ 6 million in damages and attorney's fees. See *Baralt v. Nationwide Mut. Ins. Co., 86 F. Supp. 2d 31, 42 (D.P.R. 2000)*. On appeal, Nationwide does not challenge the jury's determination that the company acted unjustifiably in terminating appellees, but contends that the evidence failed to support a finding of age discrimination. After a careful review of the record and caselaw, we agree, and therefore reverse.

I. Factual Background

In the spring of 1993, Nationwide began an investigation into allegations of fraudulent claims practices by one of its adjusters, Quinones, after appellee Baralt, claims manager in the Puerto Rico office ("NPRO"), reported "irregularities" to company headquarters. Nationwide assigned Joanne McGoldrick, an investigator in its corporate security department, to research the allegations.

During her investigation, which included three visits to Puerto Rico between October 1993 and April 1994,[1] McGoldrick learned of unrelated improper conduct allegedly committed by the vice president of the office, Enrique Lopez. Those improprieties primarily concerned the unauthorized use of company cars, or "pool" cars, and salvage vehicles, including the regular borrowing of pool cars by Lopez's sons and "sales" of salvage vehicles to NPRO employees who had not paid for them. Lopez also was accused of procuring an insurance policy at less than full cost for a Plymouth Sundance used by his son in Ohio by falsely representing that it was being driven by his wife in Puerto Rico.

McGoldrick initially verified the accusations against Lopez by speaking with NPRO's Sales and Marketing Manager, Blanca Robles, and then further investigated the claims during her April visit to Puerto Rico. Nationwide maintains that appellees were terminated in May 1994 because they interfered with the investigation into Lopez's conduct and because of their involvement in certain of the asserted improper practices. The company claims that Gonzalez helped Lopez to obtain the Sundance insurance policy and also was aware of, and facilitated, the use of pool cars by Lopez's sons. Baralt was linked to the alleged improprieties because he was in charge of salvage vehicles for NPRO.

Baralt, NPRO's claims manager, was 49 and had been employed by Nationwide for 25 years; Gonzalez, who was

60, had worked for the company for 28 years and was manager of the personal and commercial lines underwriting department. Baralt and Gonzalez were two of the six high-ranking employees at NPRO known as the "Cabinet." Two others -- Lopez and the company's comptroller, Luis Flores Dieppa ("Flores") -- also were terminated for improper conduct. The remaining two Cabinet members, one of whom was Robles, left the company about a year after the terminations. The only evidence presented at trial explaining their departures was Robles's testimony that she took advantage of the company's early retirement plan. Five non-Cabinet employees also were terminated.

At trial, in addition to presenting evidence of appellees' involvement in practices the company deemed improper, Nationwide attempted to show that both men interfered in the investigation after being instructed not to do so. McGoldrick accused Gonzalez of intimidating two female employees, whom she had found crying.[2] She also reported that on multiple occasions she found Gonzalez standing near an office where she was interviewing employees. In a report admitted as a trial exhibit, McGoldrick stated that another employee told her that Baralt had contacted all of the claims division employees who possessed salvage vehicles "and warned them of the scope of our investigation" and advised them not to tell the truth or they would lose their jobs. She further reported that other employees had stated that Baralt had discussed the interview he had with investigators even though he had been told expressly of the requirement of confidentiality.[3]

Appellees sought to rebut Nationwide's evidence of improper conduct in a variety of ways. They presented evidence that there was no company policy against after-hours use of pool cars by family members,[4] and that, moreover, giving Lopez's sons use of cars in the evening served to protect the vehicles from possible theft from the unsecured company lot, which was in a high-crime area.

Although Gonzalez acknowledged arranging the sons' use of the pool cars, he testified that he did so upon instructions from another Cabinet member, Rafael Gonzalez, and further testified that it was Rafael who had responsibility over the pool vehicles. In an effort to negate Nationwide's suggestion that company officials permitted employees to acquire salvage vehicles at no cost, plaintiffs also presented evidence that the company's books showed the debts for the cars. Testimony elicited on behalf of Gonzalez distanced him from the insurance policy obtained by Lopez on the Plymouth Sundance by suggesting that it was not issued under his authority, and there also was evidence indicating that the policy was not improper.[5] As noted, both plaintiffs denied that they had breached the confidentiality of the investigation. Gonzalez defended his frequent appearance near the room where McGoldrick was conducting interviews by explaining that he was using the nearby copy machine, not intimidating employees.

Appellees also emphasized the abruptness and insensitivity exhibited in the circumstances leading up to and accompanying plaintiffs' terminations. After McGoldrick reported on her investigation to Nationwide headquarters, Lucas, the Human Resources officer, was sent to Puerto Rico with final decision-making authority. He had not reviewed plaintiffs' personnel files, claiming that he did not want his decision to be influenced by anything in the files and noting that even a thirty-year record of good employment could be wiped out by one serious improper act. He interviewed each plaintiff for only a brief time, and, at the end of the interviews, pronounced his decision to terminate. Security personnel were standing by to escort each plaintiff with his personal belongings out of the building.

The sum total of evidence relating to age is the following:

-- Baralt, 49, was replaced by Morales, 47. Although Baralt at first testified that Morales was replaced by "a much

younger man," he later admitted that he had no idea why Morales left the company or whether his replacement was younger or much younger.

-- Gonzalez, 60, was replaced by Guzman, 43.

-- Lopez, the NPRO vice president, 54, was temporarily replaced by Robles, also 54, indeed three weeks older than Lopez. His permanent replacement was Jack Wood, whose age was not made of record.

-- Flores, NPRO's comptroller, was 44 when he was terminated. There is no evidence of his replacement's age.

-- The two Cabinet members who were not fired were Robles, 54, and Rafael Gonzalez, 57.

-- In addition to the above four Cabinet members, there were five subordinate employees discharged for misappropriation of vehicles. Nothing appears in the record concerning their ages or those of any replacements.

When Gonzalez was asked directly what support he had for his age discrimination claim, he replied:

> Well, based on the performance that I was realizing or that I was doing, my devotion to the company, the success that the agency was having every year, over 18 long years and always willing to make a maximum effort to the company's benefit, to the benefit of our customers. I was in a good state of health, there was no reason.

The jury nonetheless found that age played a motivating role in the terminations of Gonzalez and Baralt in violation of both the ADEA and Law 100, which prohibits employment discrimination based on a variety of factors, including age.[6] The jury also returned a verdict for plaintiffs on a third count for unjust dismissal under Puerto Rico's "Law 80," P.R. Laws Ann. tit. 29, § § 185a-185m, which prohibits discharges

"made by the mere whim of the employer or without cause relative to the proper and normal operation of the establishment." Id. at § 185b. The jury awarded Baralt $ 1 million in non-economic damages and Gonzalez $ 1.5 million, plus $ 500,000 to each of their wives. The district court modified these amounts by reducing the wives' damages to $ 100,000 each and by doubling the compensatory awards, as prescribed by Law 100, to $ 2 million (for Baralt) and $ 3 million (for Gonzalez). The jury also awarded back pay in the amount of $ 500,000 to Baralt and $ 400,000 to Gonzalez. Plaintiffs also were awarded more than $ 140,000 in attorney's fees, for a total of approximately $ 6.24 million.

The court, which had taken under advisement Nationwide's motion for judgment as a matter of law, ruled first that the jury was entitled to find that the company's reasons for the terminations were pretexts. *Baralt, 86 F. Supp. 2d at 37.* It then cited, as the evidentiary support for the jury finding of age discrimination, testimony by Robles that Nationwide had a company-wide retirement plan of which she had taken advantage.[7] Id.

On appeal, Nationwide challenges the district court's denial of its motion for judgment as a matter of law on the federal and Commonwealth age discrimination claims and further contends that, if it is unsuccessful in overturning the liability finding, the damage awards must be reduced because they are unsupported and excessive. Plaintiffs filed cross-appeals, claiming that they are entitled to a higher amount of both damages and attorney's fees. Our disposition in favor of Nationwide on the merits makes it unnecessary to address plaintiffs' assertions or Nationwide's challenge to the amount of damages.

II. Discussion

The primary issue we face is whether the evidence was sufficient to support the jury's finding of age discrimination.

The parties agree that, if we were to conclude that plaintiffs are not entitled to recover under Law 100, they also would have failed to prove age discrimination under the ADEA because Law 100 offers a "significantly more favorable" standard to plaintiffs than does the ADEA. *Cardona Jimenez v. Bancomercio de Puerto Rico, 174 F.3d 36, 42 (1st Cir. 1999).* Our analysis therefore begins with Law 100, and, because we conclude that plaintiffs have not shown a violation of that statute, it also ends there.

Under Law 100, a plaintiff establishes a prima facie case of age discrimination by (1) demonstrating that he was actually or constructively discharged, and (2) alleging that the decision was discriminatory. Id. If this minimal showing is made, the burden shifts to the employer to prove by a preponderance of the evidence that it had "just cause" for its actions. *Id. at 42-43; Alvarez-Fonseca v. Pepsi Cola of Puerto Rico Bottling Co., 152 F.3d 17, 28 (1st Cir. 1998).* If the employer establishes just cause, the burden of proof returns to the plaintiff. *Bancomercio, 174 F.3d at 43.* If the employer fails to prove just cause, however, it bears the burden of proving by a preponderance of the evidence that the decision was not motivated by age discrimination. Id.[8]

Nationwide acknowledges that the record permitted the jury to find that Baralt and Gonzalez were terminated without just cause,[9] requiring the company to prove that the dismissals were not motivated by age-based animus. The company asserts that the total lack of evidence suggestive of age bias, together with Nationwide's substantial evidence of a non-pretextual inquiry into improper activities at the Puerto Rico office, required the jury to reject plaintiffs' Law 100 claims. We review de novo the district court's contrary judgment, taking the facts in the light most favorable to plaintiffs. *Id. at 41.* For Nationwide to prevail, we must conclude that "there is no legally sufficient evidentiary basis for a reasonable jury to find for the plaintiffs." *Id. at 40.*

It is undisputed that the record contains no direct evidence of age discrimination, not even the sorts of stray remarks that are suggestive but often found insufficient to prove discrimination in the absence of more meaningful evidence. See, e.g., *Williams v. Raytheon Co., 220 F.3d 16, 18 (1st Cir. 2000)* (rejecting age and gender claims where supervisor told colleagues that the company was run by "old, white men," that she intended to change the corporate culture, and would favor the hiring of women and younger people); *Shorette v. Rite Aid of Maine, Inc., 155 F.3d 8, 13 (1st Cir. 1998)* (rejecting age discrimination claim where district manager had asked plaintiff "how old he was and when he planned to retire").

Although Gonzalez, who was 60, was replaced by someone significantly younger - a 43-year-old - that successor also was within the protected age group, diminishing the force of the age difference as an indicator of bias. This solitary fact gains no strength from the evidence that Baralt's replacement was only two years his junior, a difference that is insufficient to support even a prima facie case of age discrimination. See *Raytheon, 220 F.3d at 20.* Moreover, the two Cabinet members who were not discharged also were over 40; Rafael Gonzalez was 57 and Robles was 54. Lopez, the office vice president, was immediately succeeded by Robles, who was slightly older than he. The parties have not identified the ages of Lopez's ultimate replacement or the replacement for Flores, the fourth Cabinet member who was terminated. In addition, as noted earlier, there was no evidence of the ages of the five lower-level employees who were terminated. Thus, plaintiffs' affirmative showing of age discrimination consisted entirely of three facts: they were within the protected class, they were fired, and one of them was replaced by someone significantly younger -- though that individual was still within the protected age group.

Nationwide's rationale for the firings, on the other hand, was far from compelling. Taken in the light most favorable to plaintiffs, the company's position was that the two men - each with more than two decades of apparently high quality service to the company - were terminated summarily for (1) their peripheral involvement in a series of improper but relatively minor acts in which their boss and other employees had taken advantage of the company, and (2) their discussions with co-workers, in violation of instructions, about the investigation into those improper acts. Moreover, as we have noted earlier, the circumstances surrounding the terminations executed by Lucas gave every appearance of an insensitive overreaction to a series of minor transgressions.

We have no problem accepting that a jury reasonably could conclude that a large, reputable company would not act as precipitously as Nationwide could be found to have acted if its actual concern were the minor transgressions that it claimed underlay the terminations. In other words, we think the jury was entitled to disbelieve Nationwide's stated reasons for the firings. Our problem, rather, arises from the absence of evidence that would permit a conclusion that the actual reason for the firings was plaintiffs' ages. For, even in the face of Law 100's presumption, we conclude that the evidence presented by Nationwide, in the context of the evidence presented by plaintiffs, was sufficient to meet its burden under Law 100 to demonstrate that "the existence of discrimination was less probable than its nonexistence," *Belk Arce v. Martinez, 98 TSPR 109,* 98 J.T.S. 92 (P. R. 1998), Official Translation at 16.

The evidence was undisputed that Nationwide began investigating the Puerto Rico office as a result of Baralt's report concerning Quinones's allegedly fraudulent conduct, and that the specific probe leading to plaintiffs' dismissals was triggered by a tip from someone in the office about Lopez's personal use of a salvage vehicle. Robles corroborated the tip for McGoldrick before the investigator

traveled to Puerto Rico in April 1994. The inquiry into Lopez's actions led to Gonzalez and Baralt - the former because of his involvement with the fraudulent automobile policy and the pool cars, and the latter because he was responsible for salvage vehicles.

That the investigation unquestionably was triggered by employees in the Puerto Rico office, rather than by the home office executives who carried out the terminations, makes it unlikely that the inquiry was fabricated as a ruse to accomplish age-based terminations. Moreover, the fact that the investigation was launched in 1993 rules out any rational theory that it was conceived as a device to target plaintiffs, each of whom had received letters of commendation in early 1994.[10] A company seeking pretextual reasons to discharge employees on the basis of their advancing ages would be unlikely to offer thanks for those employees' "efforts and contributions to the successes of this past year."

Plaintiffs presented no evidence to discredit the authenticity of the investigation. While, as we have noted, the callous severity of the punishment in all likelihood moved jurors to doubt that the discharges occurred for the stated reasons, the evidence was substantial that the firings were in some way a byproduct of the home office probe into the Puerto Rico operations. On this record, various investigation-related explanations for terminating plaintiffs were much more likely than the completely unsubstantiated age bias asserted by plaintiffs: Nationwide may have sought to clean house at the highest levels of NPRO's management after concluding that "business as usual" there did not satisfy the company's standards; it may have interpreted reports from McGoldrick as well as the auditors as indicating a widespread laxness and invitation to corruption that had to be wiped out; the company may have decided to terminate any manager who failed to comply fully with the investigation as a show of authority to assure fidelity on the part of branch supervisors; the Human Resources officer, Lucas, may have

felt the need to justify the time and expense of the investigation by terminating a sufficiently large number of employees, whether or not they in fact committed wrongdoing, or he may simply have lost perspective and acted rashly. None of these reasons would support liability under Law 100.

In sum, with virtually no evidence besides the discharges themselves pointing to age as a factor and none indicating that the investigation was fabricated by company officials to conceal other motives, a reasonable jury could not entirely reject the company's abundant evidence that the terminations stemmed, however unwisely, from the investigation. Even under Law 100's pro-plaintiff system of shifting burdens, Baralt and Gonzalez could not prevail with the mere allegation of age bias that established their prima facie case once Nationwide presented uncontroverted evidence of a real, if overly aggressive, inquiry into office protocols. Cf. *Bancomercio, 174 F.3d at 42-43* (reversing jury verdict for plaintiff under Law 100 where "the closest approximation to evidence of age discrimination was the basic fact that [plaintiff] was over 40 when fired and was replaced by someone slightly under 40").

Nationwide's burden to defeat the presumption was to "present evidence of sufficient quality to convince the judge that the existence of discrimination was less probable than its nonexistence," Belk Arce, Official Translation at 16; *Ibanez v. Molinos de Puerto Rico, 114 D.P.R. 42 (1983),* Official Translation at 75-76. Circumstantial evidence is sufficient to meet the defendant's burden. Ibanez, Official Translation at 72 ("For the presumption to be rebutted it suffices that [the employer] proves, even through circumstantial evidence, that the motive for the discharge was not discriminatory.") (emphasis in original). Plaintiffs' efforts to counter Nationwide's substantial evidence of a genuine investigation with proof that they did little or nothing wrong shores up their claim for unjust dismissal, but such evidence is not on

its own probative of age discrimination. Cf. *Feliciano de la Cruz v. El Conquistador Resort and Country Club, 218 F.3d 1, 9 (1st Cir. 2000)* (affirming summary judgment against plaintiff on claim of national origin discrimination because "if we remanded for trial, the jury 'would be left to guess at the reasons behind the pretext'" (citation omitted)); Ibanez, Official Translation at 77 (reversing trial judge's finding of discrimination under Law 100 where plaintiff offered only "speculative" argument that she was discharged based on age rather than because of confidentiality breach).[11]

We have intently scrutinized the Puerto Rico cases cited to us to see what light they shed on a record as bereft of indicia of discriminatory intent as this. In every case we have examined, there was some evidence of discriminatory intent beyond the allegations necessary to make a prima facie case of discrimination. In *Casto Soto v. Caribe Hilton Hotel, 137 D.P.R. 294 (1994),* Official Translation at 12-13, the court noted that plaintiff not only had rebutted the employer's proffered reason for termination, but also had submitted evidence of the dominating presence of under-40 personnel and the company's efforts to create unfavorable disciplinary records for its older employees. In Belk Arce, Official Translation at 10-11, there was a consultant's report indicating anti-marriage animus within the defendant law firm, as well as a partner's specific anti-marriage statement referring to plaintiffs. In *Sandoval v. Caribe Hilton Int'l, 99 TSPR 161,* 99 J.T.S. 166 (P.R. 1999), Official Translation at 4, 6, the plaintiff introduced evidence that new management had instructed supervisors to exert pressure on older workers to retire.[12]

In a leading case in which the court reversed a judgment for plaintiff, Ibanez, Official Translation at 76-77, we find a concatenation of circumstances similar to those present here: a qualified 63-year-old plaintiff, replaced by a 20-year-old, then a 28-year-old, and finally a 57-year-old individual; and a

five-week delay between the occasion relied on as the cause of discharge (impermissibly viewing confidential records) and the actual termination. In other words, a prima facie case had been made and there was a basis for rejecting the employer's explanation. But there was no evidence of animus. Five of twelve executive secretaries in plaintiff's class were over 40, plaintiff herself had been 60 when hired, and, like plaintiffs in the case at bar, she had been looked on favorably up until the incident in question.

Having canvassed both the record and caselaw, we conclude that a decision holding that the requirements of Law 100 were met by the facts of this case would extend the statute far beyond its intended reach. If this record were enough, the result would be a virtual merging of Law 80, which bars unjust dismissals, with Law 100. Notwithstanding Law 100's presumption, proof of unjust cause cannot suffice to establish liability where there is considerable evidence of a non-discriminatory reason for the discharge and no evidence of age bias other than the employee's age. That this must be so is evident when one considers the hypothetical claim allowable under Law 100 of a minority woman over the age of 40 who alleges race, gender, and age discrimination in a termination arising from similar circumstances. Without the need for some evidence linked to the particular animus, she could recover on any, or all, of her theories by virtue of her protected status. The jury's verdict would be both speculative and unsupported with respect to each claim.

Plaintiffs may well have been terminated too precipitously, but we conclude that Nationwide met its burden to demonstrate, by a preponderance of the evidence, that Baralt and Gonzalez were not fired on account of age.

The judgments for plaintiffs on the age discrimination counts are therefore reversed, the award of attorney's fees is vacated, and the case is remanded for further proceedings as

necessary to enter judgment in connection with the claim for unjust dismissal under Law 80.

Footnotes

[1] That probe eventually led Nationwide's auditors to suspect substantial losses, specifically, that Quinones and an accomplice had defrauded the company of $ 320,000 through payments for nonexistent property damage.

[2] The hearsay rule prevented McGoldrick from specifically relating what the two employees said to her, but she testified that, after the first such encounter, she went to Gonzalez's office and said: "Stay out of this investigation. You're intimidating people, they're afraid to talk, they're crying." After the second encounter, she said she asked Gonzalez "to please refrain from contacting our people because it could be subject to disciplinary action up until grounds for termination."

[3] A Nationwide Human Resources officer, James Lucas, testified that both Baralt and Gonzalez admitted during interviews that they had spoken to employees about the investigation, but both denied at trial that they had spoken to coworkers about the inquiry.

[4] Robles testified that employees who used pool cars were required to obtain permission and record in a log the reason for the use and the specific period of time the car was needed.

[5] Plaintiffs' counsel elicited evidence indicating that the policy was renewed after the terminations, although Robles also testified that Lopez was required to pay additional

premiums for "the discrepancies" in the application.

[6] Law 100 also bars employment discrimination because of race, color, gender, social or national origin, social position, political affiliation, political or religious ideology, and marital status. P.R. Laws Ann. tit. 29, § 146.

[7] As we have elsewhere observed, an offer of early retirement is not, on its own, evidence of discriminatory animus. See *Alvarez-Fonseca v. Pepsi Cola of Puerto Rico Bottling Co., 152 F.3d 17, 27 (1st Cir. 1998); Vega v. Kodak Caribbean, Ltd., 3 F.3d 476, 480 (1st Cir. 1993).* A fortiori, an early retirement plan embracing all of a company's many branches throughout the nation is even more distanced from proof of animus. Were this not so, a host of progressive companies with such policies would be surprised to find themselves vulnerable to age discrimination suits.

[8] The burden-shifting framework under the ADEA requires more of a showing by the plaintiff, beginning with the prima facie case. See *McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802-05, 36 L. Ed. 2d 668, 93 S. Ct. 1817 (1973); Suarez v. Pueblo Int'l, Inc., 229 F.3d 49, 53 (1st Cir. 2000).* To establish a prima facie case, the plaintiff must show that: (1) he was at least 40 years old; (2) his job performance was meeting the employer's legitimate job expectations; (3) he was fired or suffered other adverse employment action attributable to the employer; and (4) the employer had a continuing need for the same services he had been performing. *Suarez, 229 F.3d at 53.* If this showing is made, a presumption of discrimination attaches. *Bancomercio, 174 F.3d at 41.* The employer at that point need only articulate a legitimate, non-discriminatory reason for the termination to shift the burden back to the plaintiff to prove by a preponderance of the evidence that the employer's

reason was a pretext and that the real reason was age-based animus. Id. Although the employer in this framework briefly has the burden of producing a legitimate reason for the discharge, the burden of persuasion always remains on the employee. Id.

[9] Although the company states that it assumes only arguendo, for purposes of the appeals, that the record supports such a finding, the jury made the specific determination that the company had violated Law 80 by discharging each plaintiff without just cause. The company did not appeal the Law 80 verdicts.

[10] Both received letters dated March 4, 1994, from the senior vice president for business operations, William P. DeMeno, with information about their payments under the 1993 Management Incentive Plan.

[11] The strength of Nationwide's evidence of a legitimate investigation distinguishes this case from *Reeves v. Sanderson Plumbing Prods., Inc., 530 U.S. 133, 120 S. Ct. 2097, 2104, 147 L. Ed. 2d 105 (2000),* in which the Supreme Court upheld a jury's finding of an ADEA violation based on plaintiff's prima facie case and "sufficient evidence for a reasonable factfinder to reject the employer's nondiscriminatory explanation for its decision." Although Law 100 differs from the ADEA in that the defendant bears the burden of disproving discrimination, the factors we consider in assessing the evidence are the same:

> the strength of the plaintiff's prima facie case, the probative value of the proof that the employer's explanation is false, and any other evidence that supports the employer's case and

> that properly may be considered on a motion for judgment as a matter of law.

120 S. Ct. at 2109. Here, as we have explained, consideration of these factors, including the failure of plaintiffs' evidence to "shed any light on . . . [the employer's] true reason for firing" them, *Feliciano de la Cruz, 218 F.3d at 8,* reveals "the particular weakness" of plaintiffs' case, *id. at 10.*

[12] We note that Sandoval constitutes a "judgment," rather than an opinion of the Puerto Rico Supreme Court, and therefore carries no precedential value beyond the "'intrinsic persuasive value of its rationale.'" *Clemente v. Carnicon-Puerto Rico Mgmt. Assocs., 52 F.3d 383, 389 n.6 (1st Cir. 1995)* (quoting *Rivera Maldonado v. Commonwealth of Puerto Rico, 119 D.P.R. 74 (1987)* (Official English Translation, No. R-85-117, slip op. at 4-5)),*abrogated on other grounds by United States v. Gray, 199 F.3d 547 (1st Cir. 1999).*

Civ. No. 95-2421 (PG)

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF PUERTO RICO

MANUEL A. BARALT, LIZETTE PENA-AVILES, and their marital partnership, JUAN GONZALEZ-PEREZ, MONSERRATE CANABAL-DURAN, and their marital partnership,
Plaintiffs

v.

NATIONWIDE MUTUAL INSURANCE, CO, NATIONWIDE MUTUAL FIRE INSURANCE CO., NATIONWIDE LIFE INSURANCE CO., NATIONWIDE GENERAL INSURANCE CO., NATIONWIDE PROPERTY AND CASUALTY INSURANCE CO., NATIONWIDE GROUP OF COMPANIES., and WILLIAM P. DE-MENO,
Defendants

February 23, 2000, Decided

DISPOSITION:
Defendants motion for judgment as a matter of law DENIED.

COUNSEL:
For MANUEL A. BARALT, LIZETTE PENA-AVILES, CONJUGAL PARTNERSHIP BARALT-PENA, JUAN GONZALEZ-PEREZ, MONSERRATE CANABAL-DURAN, CONJUGAL PARTNERSHIP GONZALEZ-CANABAL, plaintiffs: James D. Noel-High, McConnell Valdes, San Juan, PR.

For NATIONWIDE MUTUAL INSURANCE COMPANY, defendant: Arturo Diaz-Angueira, Cancio, Nadal, Rivera & Diaz, San Juan, PR.

For NATIONWIDE MUTUAL INSURANCE COMPANY, defendant: Robert A. Fleming, San Juan, PR.

JUDGES:
JUAN M. PEREZ-GIMENEZ, U.S. District Judge.

OPINIONBY:
JUAN M. PEREZ-GIMENEZ

OPINION:

OPINION & ORDER

After a five day trial, the jury found that Defendants Nationwide Insurance Co., Nationwide Mutual Fire, Insurance Co., Nationwide Life Insurance Co., Nationwide General Insurance Co., Nationwide Property and Casualty Insurance Co., Nationwide Group of Companies., and William P. De-Meno ("Nationwide") discharged both Manuel A. Baralt and Juan Gonzalez Perez in violation of both the Age Discrimination in Employment Act ("ADEA") of 1967, *29 U.S.C. § 621, et seq.*, and Act No. 100, P.R. Laws Ann. tit. 29, § 146, *et seq.* The jury also determined that Nationwide discharged Baralt and Gonzalez without just cause and in violation of Act No. 80, P.R. Laws Ann. tit. 29, § 185a, *et seq.*, awarded Plaintiffs Manuel A. Baralt, his wife Lizette Pena Aviles, Juan Gonzalez Perez, and his wife Monserrate Canabal Duran a total of $ 4,400,000.00.[1]

Defendants made several motions for judgment as a matter of law, one at the close of Plaintiffs' case and again at the close of evidence, which the Court took under advisement. After the jury verdict, Defendants also made a

motion for directed verdict, which the Court denied. Defendants now renew their motion for judgment as a matter of law. Plaintiffs filed a motion in opposition to Defendants' Motion Requesting Judgment Notwithstanding the Verdict, or in the Alternative, Remittitur of the Damage and Back Pay Awards or the Celebration of a New Trial.[2]

The Court also has in front of it motions by Plaintiffs for Attorney's Fees (Dkt. 55), for Double Indemnity under Act No. 100 (Dkt. 56) and for Prejudgment Interest (Dkt. 67). Defendants responded to Plaintiffs' motions in several motions of their own. (Dkts. 66 & 76)

FACTS

The evidence, seen in the light most favorable to Plaintiffs, is as follows: Juan Gonzalez Perez ("Gonzalez") worked for Nationwide for over 28 years. Manuel Baralt worked for Nationwide for over 24 years. Nationwide fired Baralt on April 28, 1994 and fired Gonzalez on May 10, 1994. Each was replaced by a younger employee. Each was escorted out of the Nationwide premises through the back door by security personnel.

Nationwide presented four reasons why Gonzalez and Baralt were fired, and why age was not a factor. Nationwide first alleged that each knew of Mr. Enrique Lopez' son's use of a pool car.[3] Both employees admitted such, as did virtually every other employee Nationwide interviewed. It was no secret.

Second, Nationwide alleged that Baralt and Gonzalez were involved in "irregularities" surrounding a salvage car-a British Sterling. Again, the misuse was performed by Enrique Lopez and again, many employees knew of the car and its situation. Gonzalez merely drove the car from Lopez' home in Dorado back to Nationwide during business hours. Baralt knew of the car and its whereabouts. Beyond this, it is unclear what Nationwide is alleging he did wrong.[4]

Third, Nationwide discovered an insurance policy issued to Lopez' family for a Plymouth Sundance. The car was purchased in Cincinnati, Ohio. Lopez called Gonzalez to tell him to fill out an application for him on the car. Lopez told Gonzalez he was bringing the car to Puerto Rico and wanted it insured there. The application listed the principal driver as Lopez' wife, when in fact it was his son. The car also remained in Ohio. Several employees saw and worked on the policy besides Gonzalez and ultimately it was not Gonzalez' decision whether to issue the policy. After Gonzalez and Baralt were fired, the policy was renewed by Nationwide.

Fourth, Nationwide alleged that both Gonzalez and Baralt interfered with an investigation by a Nationwide investigator and intimidated several employees. Additionally, Nationwide alleged that Baralt and Gonzalez breached an unwritten confidentiality understanding. The jury disbelieved Nationwide's allegations, and the Court cannot substitute its judgment for that of a jury's when, as here, the jury's finding is amply supported by facts.

FED. R. CIV. P. 50-JUDGMENT AS A MATTER OF LAW

I. STANDARD

Before the Court is Defendants' Renewal of Motion for Judgment as a Matter of Law under FED. R. CIV. P. 50(b). Rule 50(b) provides that a Rule 59 motion for a new trial may be joined with or in the alternative to the Renewal. The Court has the discretion to "allow the judgment to stand or may reopen the judgment and either order a new trial or direct the entry of judgment as a matter of law." FED. R. CIV. P. 50(b). Rule 50 only applies in cases tried to a jury with the power to return a binding verdict. *See* 9A CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 2523 n.1 (2d ed. 1994) (citing *Schlitt*

v. Florida, 749 F.2d 1482 (11th Cir. 1985), aff'd, 837 F.2d 940 (11th Cir. 1988), cert. denied, 490 U.S. 1028 (1989)).

Whether the evidence presented at trial will permit the Court to enter judgment as a matter of law is solely a question of law for the Court and the party seeking to overturn a jury verdict faces an uphill battle. *See Haschmann v. Time Warner Entertainment Co. L.P., 151 F.3d 591, 599 (7th Cir. 1998). See also Yesudian v. Howard Univ., 332 U.S. App. D.C. 56, 153 F.3d 731 (D.C. Cir. 1998).* The Court will not overturn the jury's verdict so long as there is evidence upon which the jury properly could find a verdict for that party. *See Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 252, 91 L. Ed. 2d 202, 106 S. Ct. 2505 (1986).* "A trial judge may not upset the jury's verdict merely because he or she would have decided the case differently," *Coastal Fuels of P.R. v. Caribbean Petroleum, 79 F.3d 182, 201 (1st Cir. 1996), cert. denied, 519 U.S. 927, 136 L. Ed. 2d 214, 117 S. Ct. 294 (1996)* (quoting *Velazquez v. Figueroa-Gomez, 996 F.2d 425, 427 (1st Cir. 1993), cert. denied, 510 U.S. 993, 126 L. Ed. 2d 454, 114 S. Ct. 553 (1993)),* for it is not what the judge believes but rather what the jury "could have found." *Ramos v. Davis & Geck, Inc., 167 F.3d 727, 734 (1st Cir. 1999).* In it's review, the Court must view the evidence in the light most favorable to the non-moving party. *See Galloway v. United States, 319 U.S. 372, 87 L. Ed. 1458, 63 S. Ct. 1077 (1943); Cardona Jimenez v. Bancomercio de Puerto Rico, 174 F.3d 36, 40 (1st Cir. 1999); Ramos v. Davis & Geck, Inc., 167 F.3d at 731.*

A "non-moving party must submit more than a mere scintilla of evidence as to an issue on which it bears the ultimate burden of persuasion in order to resist or reverse the entry of judgment as a matter of law on that issue. *See Coyante v. Puerto Rico Ports Auth., 105 F.3d 17, 21 (1st Cir. 1997)." Alvarez-Fonseca v. Pepsi-Cola of P.R., 152 F.3d 17, 24 (1st Cir. 1998), cert. denied, 526 U.S. 1123, 119 S. Ct. 1778, 143 L. Ed. 2d 806 (1999).* On the other hand, a

"plaintiff need not and 'should not be required to produce "smoking-gun" evidence before prevailing in a discrimination suit. There are many veins of circumstantial evidence that may be mined by a plaintiff to this end . . . .' *Mesnick v. General Elec. Co., 950 F.2d 816, 825 (1st Cir. 1991)*[, *cert. denied, 504 U.S. 985, 119 L. Ed. 2d 586, 112 S. Ct. 2965 (1992)]*." *Speen v. Crown Clothing Corp., 102 F.3d 625, 635 (1st Cir. 1996), cert. denied, 520 U.S. 1276, 138 L. Ed. 2d 214, 117 S. Ct. 2457 (1997).* A fundamental principle to be followed is that there must be a minimum of judicial interference with the jury. 9A WRIGHT & MILLER, FEDERAL PRACTICE AND PROCEDURE § 2524 n.14.

II. ADEA CLAIM

The ADEA prohibits an employer from discharging an employee because of his age. In a wrongful discharge case, such as this, the plaintiff bears the ultimate burden of proving that he would not have been fired but for his age. *See Cardona-Jimenez v. Bancomercio de P.R., 174 F.3d at 40* (citing *Serrano-Cruz v. DFI P.R. Inc., 109 F.3d 23, 25 (1st Cir. 1997).* Without direct evidence of discriminatory animus, the *McDonnell Douglas* burden-shifting sequence controls. *See McDonnell Douglas Corp. v. Green, 411 U.S. 792, 36 L. Ed. 2d 668, 93 S. Ct. 1817 (1973); Cardona-Jimenez v. Bancomercio de P.R., 174 F.3d at 40-41; Alvarez-Fonseca v. Pepsi-Cola of P.R., 152 F.3d at 24.*

McDonnell Douglas directs the Court to follow a three step sequence for age discrimination cases. First, the plaintiff must present a *prima facie* age discrimination case. This modest burden requires a showing by the plaintiff that (1) he was a member of a protected age group, *i.e.*, he is 40 years old or older; (2) he was performing his job adequately; (3) he was fired; and (4) the employer had a continuing need for the same services, and/or he was replaced by a person with the same or similar qualifications as the plaintiff. *See Cardona-*

Jimenez v. Bancomercio de P.R., 174 F.3d at 41. Once a plaintiff meets this burden, a presumption of discrimination attaches. *See Id.* The employer then must articulate a "legitimate, nondiscriminatory reason" for firing the employee. *Id.* If the employer sets forth a legitimate, nondiscriminatory reason the presumption of discrimination vanishes and the employee must prove that the reason is a sham *and* that the real reason for the firing is age. *See Id.* The burden of persuasion remains with the employee at all times. *See Id.*

Defendants concede that Plaintiffs proved their *prima facie* case. Defendants presented its alleged non-discriminatory reasons for the dismissals of Baralt and Gonzalez, in an attempt to satisfy phase two of the *McDonnell Douglas* sequence. Plaintiffs tried next to prove, and the jury believed, that Defendants alleged dismissal reasons were a sham. Looking at the facts in a light most favorable to Plaintiffs, the Court thus accepts the following to be true: (1) Plaintiffs made out a *prima facie* case; (2) Defendants presented its reasons for the dismissals; and (3) the reasons were a sham or not valid.

Defendants incorrectly state that a defendant need not have a legitimate reason for termination; "they don't have to be valid reasons, they just have to be non-discriminatory reasons." Tr. at 305. Defendants cannot fire an employee and go back and create a non-discriminatory reason to justify its actions. Worse yet, a defendant may not plan in advance to fire an employee while all the while dismissing him due to age. The key component is that an employer fired an employee due to age, but the reason articulated must be legitimate. The jury was entitled to find that Defendants' reasons were not valid or not legitimate.

If Defendants' reasons are legitimate or valid, the remaining issue under the *McDonnell Douglas* sequence is whether Plaintiffs provided enough evidence for the jury to

find that age was the real reason why Nationwide fired Baralt and Gonzalez. Baralt and Gonzalez were allegedly fired because of "irregularities." But these "irregularities" were caused by Enrique Lopez, the boss of both Baralt and Gonzalez (as well as the other three cabinet members Blanca Robles, Rafael Gonzalez and Luis Flores Diepa). Defendants' own witness, a former cabinet member, testified that any adverse action against Lopez could cost a board member his or her job:

> Q: So at no point did you personally inform [sic] anyone in Columbus, Ohio that Mr. Lopez was acting improperly by keeping in his house a salvage car?"
>
> A: Neither [sic] by me or any of the other cabinet members of the cabinet because it would [sic] have adversely affected our jobs."

Tr. at 335. The cabinet members followed the orders of their boss, Mr. Enrique Lopez, and simply had no authority to contradict Mr. Lopez' instructions. Tr. at 339. Nationwide attempted to pass Lopez' wrongdoing on to Baralt and Gonzalez. The cabinet members all acting similarly and were treated differently. The jury performed their duty as fact finders and disbelieved the Defendants proffered reasons.

If the jury rejects the employers' reasons for dismissal as a pretext for age discrimination, the Court is not free to resurrect those same reasons for other purposes. *See Lindsey v. American Cast Iron Pipe Co., 810 F.2d 1094, 1098 (11th Cir. 1987).* Furthermore, the same witness for Defendants testified that Nationwide had a national retirement plan to cut payroll throughout the entire country. *See* Dkt. 80, at 16; Tr. at 326-27.

> Q: Isn't it a fact that the national retirement plan [of Nationwide] became a complement of Nationwide's efforts to cut the payroll in the Puerto Rico operation?
>
> A: I would say no because this retirement plan was implemented throughout the nation.

Tr. at 326-27. The jury could have found that Nationwide had a retirement plan to cut payroll implemented throughout the nation; Nationwide headquarters fired Baralt and Gonzalez without valid reasons; and that retirement plan was implemented to help or force older employees to retire.

"The jury heard both sides and the jury spoke. That is all there is to say about age discrimination liability in this case. There were clearly two sides to this case. The jury believed [Baralt and Gonzalez] and [their] evidence; it did not believe [Nationwide]." *Wilson v. Monarch Paper Co., 939 F.2d 1138, 1146 (5th Cir. 1991), cert. denied, 502 U.S. 821 (1991).*

An employee fired in violation of ADEA is entitled to back pay he or she would have earned from the date of the wrongful discharge until trial, less any severance amounts and mitigation. *See, e.g., Buchholz v. Symons Mfg. Co., 445 F. Supp. 706 (E.D. Wis. 1978).* The duty to mitigate means an employee must, with reasonable diligence, attempt to secure a comparable position. *See id.* Although some courts have allowed compensatory damages under ADEA, *see id.*, the general rule is they are not awarded without a finding of "willfulness" on the part of an employer. The Court expressly ruled that no willfulness was present in this case.

The jury awarded Baralt and Gonzalez $ 900,000.00 as back pay under ADEA, a sum the Court affirms at this time. Therefore, for the reasons stated above, Defendants motion

for judgment as a matter of law is DENIED and Plaintiffs' award for back pay under ADEA is upheld.

III. ACT NO. 100 CLAIM

There are significant differences in the burden of proof requirements under the ADEA and Act No. 100. As stated above, under the ADEA the plaintiff bears the ultimate burden of proving that he would not have been fired but for his age. *See Cardona-Jimenez v. Bancomercio de P.R.,174 F.3d at 40* (citing *Serrano-Cruz v. DFI P.R. Inc., 109 F.3d at 25. McDonnell Douglas* shifts only the burden of production once a plaintiff establishes a *prima facie* case. Once the defendant produces a legitimate, nondiscriminatory reason the burden shifts back to the plaintiff. The burden of persuasion remains with the plaintiff at all times under the ADEA.

The sequence under Act No. 100 differs in a slight, yet important, fashion. "Under Act No. 100 . . . once the employee triggers the [Act No. 100]'s protections by showing that his discharge . . . was not justified, the employee enjoys a presumption that he or she has been the victim of discrimination and the burdens of both production and persuasion shift to the employer." *Ramos v. David & Geck, Inc., 167 F.3d at 734* (citing *Alvarez-Fonseca v. Pepsi Cola of P.R., 152 F.3d at 27,* in turn citing *Ibanez Benitez v. Molinos de P.R.*, 114 P.R. Off. Trans. 58 (1983)). Act No. 100 is thus friendlier to plaintiffs than the ADEA and an employer under Act No. 100 must prove by a preponderance of the evidence that the discharge was not motivated by a "discriminatory age animus." *Ramos v. Davis & Geck, Inc., 167 F.3d at 734; Alvarez-Fonseca v. Pepsi Cola of P.R., 152 F.3d at 27.*

The same facts may support a finding under both Act No. 100 and the ADEA. The jury found Defendants violated Act No. 100 and awarded them $ 2,500,00.00 in compensatory

damages.[5] For the reasons stated above, Defendants motion for judgment as a matter of law is DENIED and the jury's award of $ 2,500,000.00 is upheld.

IV. ACT NO. 80 CLAIM

"There is no question that Act No. 80[, 29 L.P.R.A. § 185a,] is the exclusive remedy for wrongful discharge in Puerto Rico." *Weatherly v. International Paper Co., 648 F. Supp. 872, 875 (D.P.R.1986). See also Prudential-Bache Secs., Inc. v. Tanner, 72 F.3d 234, 239 (1st Cir. 1995); Vargas, et al. v. Royal Bank of Canada, et al., 604 F. Supp. 1036, 1039 (D.P.R. 1985).* Act No. 80 is a remedial statute that mandates payment to an employee when that employee is wrongfully discharged. *See* L.P.R.A. § 185a. Act No. 80 provides in part:

> Every employee in commerce, industry or any other business or place of employment designated hereinafter as the establishment, in which he works for compensation of any kind, under contract without a fixed time, who is discharged from his employment without good cause shall be entitled to receive from his employer, in addition to the salary he may have earned:
>
> (a) the salary corresponding to one month as indemnity;
> (b) an additional progressive indemnity equivalent to one week for each year of service.

29 L.P.R.A. § 185a.

In enacting Act No. 80, the "legislature sought to strike a balance between the freedom of choice inherent to an

employer and the social need to do away with arbitrary terminations of employment." *Vargas, 604 F. Supp. at 1039* (citing *Srio. del Trabajo v. I.T.T.*, 1979 PR Sup. LEXIS 72, *108 D.P.R. 536, 540-41 (1979)*, citing in turn a report prepared by the Civil Rights Commission, August of 1959). Act No. 80 provides for dismissal compensation for employees-at-will fired without "just cause."

> Dismissal compensation is an important event of social justice due to man as a factor of production, insofar as he, as a worker, is a minor participant of the fruits of the enterprise, and is not entitled to the liquidation of dividends, benefits, or accrued interests in the worthy task of earning, with his effort, the daily bread he shares with his family and for whom the act of saving is a mere dream devoured by privation. When unemployment dooms a human being and his family to hunger or to indignity, we must be very demanding before depriving him of the protection he has gained through our social legislation. Only a very serious offense would justify the suspension of modest relief directed to support a family in the transition to a new job without becoming a burden for the State. There must be a very clear justification to dismiss him from his job without giving this minimal payment for his years of service which represent his only asset to the structure of production: his energy, his intellectual and physical capacity during his most fruitful years, in short, his health which time deteriorates.

Srio. del Trabajo v. I.T.T.,8 P.R. Off. Trans. at 573-74.

"'Absent an express contract to the contrary, an employee hired for an indefinite term is terminable at the will of the employer without notice.'" *Hopgood, et al. v. Merrill Lynch, Pierce, Fenner & Smith, et al., 839 F. Supp. 98, 109-110 (D.P.R. 1993), aff'd, 36 F.3d 1089 (1st Cir. 1994)* (quoting *Weatherly v. International Paper Co., 648 F. Supp. at 875).* Puerto Rico courts have not recognized a right for at-will employees to sue for wrongful discharge outside of the remedies given under Act No. 80 for discharge without cause. *See Hopgood, 839 F. Supp. at 109-110; Alvarado Morales v. Digital Equipment Corp., 669 F. Supp. 1173, 1184 (D.P.R. 1987), aff'd, 843 F.2d 613 (1st Cir. 1988).* Because Baralt and Gonzalez were at-will employees, any claim for wrongful discharge (excluding age discrimination, etc.) is covered under Act No. 80, the exclusive remedy under Puerto Rico law. *Id. 669 F. Supp. at 1183-84.*

Section 185b defines "just cause" as:

> (a) That the worker indulges in a pattern of improper or disorderly conduct.
> (b) The attitude of the employee of not performing his work in an efficient manner; or of doing it belatedly and negligently or in violation of the standards of quality of the product produced or handled by the establishment.
> (c) The employee's repeated violations of the reasonable rules and regulations established for the operation of the establishment, provided a written copy thereof has been opportunely furnished to the employee.
> (d) Full, temporary or partial closing of the operations of the establishment.
> (e) Technological or reorganization changes as well as changes of style, design or the nature of the product made or handled by the

> establishment, and changes in the services rendered to the public.
> (f) Reduction in employment made necessary by a reduction in the anticipated or prevailing volume of production, sales or profits at the time of the discharge.

29 L.P.R.A. § 185b. However, § 185b advises that a "discharge made by the mere whim of an employer or without cause relative the to proper and normal operation of the establishment shall not be considered as a discharge for good cause." *Id.*

Whether Baralt and Gonzalez were fired over single incidents or patterns of behavior shapes the Court's decision-making process. As the terms "pattern," "performing," and "repeated" infer, Act No. 80 does not encourage dismissal as the penalty for a first offense. *See Srio. del Trabajo*, 8 P.R. Off. Trans. 568, 542-43 (1979). However, "dismissal for the first or single offense, when the intensity of the offense requires it in order to protect the good operation of the enterprise and the safety of its employees," is not out of the question. *Id. See also Vargas, 604 F. Supp. at 1040.* The Supreme Court of Puerto Rico has also held that the incompetence and failure of a supervisor to control *situations* in the workplace can rise to the level of "just cause." *Narvaez v. The Chase Manhattan Bank*, 1988 PR Sup. LEXIS 137, *120 D.P.R. 731 (1988).*

Here, the jury found for Plaintiffs under Act No. 80.[6] As discussed above, the jury had the responsibility to weigh and judge the evidence and it is not for this Court to re-weigh or re-judge these issues unless the jury was biased or other impediments occurred to have prevented a fair, impartial trial. Because the trial was fair, and no showing of any bias was presented by Defendants, and for the reasons stated above, Defendants motion for judgment as a matter of law is DENIED.

FED. R. CIV. P. 59 REMITTITUR

The Court has the discretion to order a new trial or a new trial limited to the issue of damages if it finds the jury awarded excessive. *See* FED. R. CIV. P. 59. However, the Court is not free to set aside the jury's verdict merely because it might have awarded a different amount of damages:

> the Court has considered that although the question of excessiveness of a jury award falls squarely within the discretionary powers of this Court, the Court cannot arbitrarily substitute its judgment for that of the jury. *Bryant v. Mathis*, 278 [] F.2d 19 [(D.C. Cir. 1960)]. More so, when as here, the amount awarded includes unspecified compensation for pain and suffering. *Rivera v. Rederi A/B Nordstjernan, 456 F.2d 970 (1st Cir. 1972)* [, *cert. denied, 409 U.S. 876, 34 L. Ed. 2d 128, 93 S. Ct. 124 (1972)]*. Where damages are unliquidated and there can be no fixed measure of mathematical certainty, this Court would be reluctant to overturn a jury award even if it would have awarded less had the case been tried without a jury. *Werthan Bag Corp. v. Agnew, 202 F.2d 119 (6th Cir. 1953); Devlin v. Safeway Stores, Inc., 235 F. Supp. 882 (D.C.N.Y. 1964).*
>
> The profound insight and discernment generally displayed by jurors as to the proper measure of damages for personal injuries cannot be treated lightly. Absent a showing that the jury was improperly motivated by passion, prejudice or sympathy, or a showing that the jury's award was so grossly excessive and unreasonable so as to "shock the

> conscience," the assessment of damages made by a jury cannot be substituted by the Court.

See Cabassa v. American Union Transp., 58 F.R.D. 200, 204 (D.P.R. 1972) (Toledo, J.). In the event the Court's conscience is "shocked," the Court may reduce the award to the highest amount the jury might have awarded. *See Conjugal Partnership v. Conjugal Partnership, 798 F. Supp. 892 (D.P.R. 1992), aff'd by Jones & Jones v. Pineda & Pineda, 22 F.3d 391 (1st Cir. 1994).*

Here, there can be no such stupefaction as to the awards for Baralt and Gonzalez; there was ample evidence from which the jury could find damages in the stated amounts. However, the Court agrees with the Defendants that Plaintiffs Pena and Canabal's awards are grossly exaggerated *given the lack of evidence introduced at trial.* After a thorough review of the record, the Court reduces Plaintiffs Pena and Canabal's awards to $ 100,000.00 each under Rule 59. Defendants' motion for a new trial is likewise DENIED.

ATTORNEY'S FEES & DOUBLE INDEMNITY UNDER ACT NO. 100

I. ATTORNEY'S FEES

Plaintiffs requested attorney's fees be awarded them under Act No. 100. (Dkt. 55) Both Act No. 100 and ADEA allow a prevailing plaintiff to recover attorney's fees. Plaintiffs are a prevailing party in this case. *See Farrar v. Hobby, 506 U.S. 103, 121 L. Ed. 2d 494, 113 S. Ct. 566 (1992).* Plaintiffs have the burden of "establishing an accurate and reliable basis for an award of attorney's fees, *Hensley v. Eckerhart, 461 U.S. 424, 437, 103 S. Ct. 1933, 76 L. Ed. 2d 40* [] (1983), and [] the district court has wide discretion in making a fee award determination." *Phillip v. ANR Freight*

Sys., Inc., 61 F.3d 669, 675 (8th Cir. 1995), reh'g en banc denied, 1995 U.S. App. LEXIS 28274 (8th Cir. Oct. 11, 1995).

The Supreme Court of Puerto Rico has determined that "ordinarily, the amount that the attorney of a prevailing worker may receive under an Act No. 100 claim shall be twenty-five (25%) of the base compensation awarded to the worker." *Lopez-Vicil v. ITT Intermedia, Inc.*, 97 J.T.S. 104, 1250, 1254 (1997). "In other words, the reward is 25% of the compensatory damages award before the award is doubled." *Ramos, et al. v. Davis & Geck; et al., 976 F. Supp. 108, 109 (D.P.R. 1997), aff'd by 167 F.3d 727 (1st Cir. 1999)* (citing *Lopez Vicil v. ITT Intermedia. Inc.*, 97 J.T.S. 104, at 1250 (June 26, 1997)). On the other hand, the Lodestar method in determining attorney's fees in generally used under ADEA.[7]

Beyond acknowledging that Plaintiffs are entitled to attorney's fees in this case, the Court will refrain from deciding the exact amount due to them until after Plaintiffs have turned in clear, accurate and reliable records. At that time the Court may award attorney's fees based upon Act No. 100's 25% suggestion, ADEA's lodestar method, or a combination of the two.

II. DOUBLE INDEMNITY

Plaintiffs also requested the grant of double damages under Act No. 100. *See* 29 L.P.R.A. § 146(a); (Dkt. 56); *Sanchez v. Puerto Rico Oil Co., 37 F.3d 712, 724-25 (1st Cir. 1994).* As the doubling of the award is punitive in nature, it has been held that there is no conflict in doubling the award. *See Sanchez, 37 F.3d at 725.* The doubling of base compensatory damages under Act No. 100 is not discretionary. Therefore, the Court orders the base compensatory damages under Act No. 100 be doubled. As such, Plaintiff Baralt is entitled to $ 2,000,000.00 under Act No. 100 and $ 500,000.00 back-pay under ADEA. Plaintiff

Gonzalez is entitled to $ 2,500,000.00 under Act No. 100, as well as $ 400,000.00 back pay award under ADEA.

PREJUDGMENT INTEREST

Plaintiffs have requested an award of prejudgement interest. An award of prejudgment interest is within the discretion of the court. *See De Leon Lopez v. Corporacion Insular de Seguros, et al., 742 F. Supp. 44, 48 (D.P.R. 1990), aff'd, 931 F.2d 116 (1s: Cir. 1991). See also Newell Puerto Rico, Ltd. v. Rubbermaid Inc., 20 F.3d 15 (1st Cir. 1994); Phillip v. Air Freight Sys., Inc., 61 F.3d at 675-76.* Puerto Rico Rule of Civil Procedure 44.3(b) allows for prejudgment interest if a defendant acts rashly, more commonly referred to as obstinate, during the litigation. *See Ramos v. Davis & Geck, 167 F.3d at 734* (citing *Dopp v. Pritzker, 38 F.3d 1239, 1252 (1st Cir. 1994),* in turn citing *De Leon Lopez v. Corporacion Insular de Seguros, 931 F.2d 116, 126-27 (1st Cir. 1991)).* In the case of damage awards, a plaintiff is entitled to legal interest on the sum awarded from the date of filing of the complaint through that of the judgment. *See* P.R.R. Civ. P. 44.3(b).

The Court does not believe that Defendants acting obstinately during trial. At the end of trial the Court congratulated each side for a well-tried case. *See Ramos v. Davis & Geck, 167 F.3d at 734.* Moreover, at the close of Plaintiffs' case-in-chief, Plaintiffs abandoned their libel and slander claim. If Plaintiffs had not abandoned the claim, the Court would have, for Plaintiffs introduced no evidence on the subject. The Court declines the invitation by Plaintiff Pot to call Defendant Kettle black and denies Plaintiffs' request for prejudgment interest.

CONCLUSION

For the reasons stated above, Defendants motion for judgment as a matter of law is DENIED. Furthermore:

(1) The Court upholds the jury's award of $ 900,000.00 for back-pay under ADEA.
(2) The Court upholds the $ 2,500,000.00 award under Act No. 100.
(3) Pursuant to Act No. 100 claim, the compensatory damages award is hereby doubled to $ 5,000,000.00.
(4) The Court reduces Plaintiff Lizette Pena-Aviles' and Plaintiff Monserrate Canabal-Duran's awards to $ 100,000.00.
(5) The jury's verdict regarding Act No. 80 is upheld.
(6) Defendants' request for a new trial is DENIED.
(7) Plaintiffs' motion for prejudgment interest is DENIED.

The Court will reserve judgment on the amount of an attorney's fees award pending the introduction of Plaintiffs of accurate and reliable information regarding that subject.

IT IS SO ORDERED.

San Juan, Puerto Rico, February 23, 2000.

JUAN M. PEREZ-GIMENEZ

U.S. District Judge

Footnotes

[1] The jury awarded $ 1,500,000.00 to Gonzalez for compensatory damages and $ 400,000.00 to him in back pay. The jury also awarded Gonzalez' wife, Monserrate Canabal Duran $ 500,000.00 in compensatory damages. Baralt was awarded $ 1,000,000.00 for compensatory damages by the jury as well as $ 500,000.00 for back pay. Baralt's wife,

Lizette Pena Aviles was awarded $ 500,000.00 in compensatory damages.

[2] Defendants have made a renewed motion for judgment as a matter of law. While the title judgment notwithstanding the verdict, or it's Latin abbreviation, JNOV, standing short for judgment non obstante veredicto, is no longer used in F.R. CIV. P. 50, Courts are to consider such a mistake as "merely formal." After all, old habits die hard.

[3] Lopez was the boss of Gonzalez and Baralt. He ordered that his son be permitted to take the pool car home each night to prevent its theft or damage. The practice stopped when a fence was completed around Nationwide's property.

[4] If knowledge were enough for dismissal, why were some employees spared while others dismissed. Such behavior is questionable. Nationwide implies, without coming out and explicitly saying it, that Gonzalez and Baralt's inaction is actionable. But this places the employee between a rock and a hard place; rat on your boss and risk being fired, say nothing and risk being fired. The jury was charged with drawing this line and the Court can see no reason to redraw it.

[5] Although the jury instructions were far from clear on damages, the it is a legal impossibility to give compensatory damages under the ADEA. Compensatory damages are only available under Act No. 100 in this case.

[6] There can be no award under both Act No. 100 and Act No. 80 if the Act No. 100 award exceeds the Act No. 80 award. In that case, the latter is excluded by the former.

[7] In computing attorney's fees, the Court may consider: (1) the time and labor required, (2) the novelty and difficulty of questions, (3) the skill required to perform the legal services properly, (4) the preclusion of other employment by the attorney because of his acceptance of the case, (5) the customary fee, (6) whether the fee is fixed or contingent, (7) any time limitations imposed by the client or circumstances, (8) the amounts involved and the results obtained, (9) the experience, reputation and ability of the attorneys, (10) the "undesirability" of the case, (11) the nature and length of the professional relationship with the client, and (12) the awards in other similar cases. Of course, this list not exclusive.

Civ. No. 95-2421 (PG)

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF PUERTO RICO

MANUEL A. BARALT, LIZETTE PENA-AVILES, and their marital partnership, JUAN GONZALEZ-PEREZ, MONSERRATE CANABAL-DURAN, and their marital partnership,
Plaintiffs

v.

NATIONWIDE MUTUAL INSURANCE, CO, NATIONWIDE MUTUAL FIRE INSURANCE CO., NATIONWIDE LIFE INSURANCE CO., NATIONWIDE GENERAL INSURANCE CO., NATIONWIDE PROPERTY AND CASUALTY INSURANCE CO., NATIONWIDE GROUP OF COMPANIES., and WILLIAM P. DE-MENO,
Defendants

OPINION & ORDER

Plaintiffs' right to recover attorney's fees in this case is a foregone conclusion; both Act No. 100 and ADEA allow a prevailing plaintiff to recover attorney's fees and Plaintiffs are clearly a prevailing party in this case. *See Farrar* v. *Hobby*, 506 U.S. 103 (1992). Plaintiffs requested that attorney's fees be awarded them under Act No. 100. (Dkt. 94) Defendants countered that the lodestar method under ADEA is more appropriate for determining attorney's fees. (Dkt. 101)

As is typical of judicial issues, recovery is not an open and shut case; there are hurdles. It is Plaintiffs burden to establish by "an accurate and reliable basis for an award of attorney's

Fees. *Hensley* v. *Eckhart,* 461 U.S. 421,437 [] (1983)." *Phillip v. ANR Freight Sys. Inc.,* 61 F.3d 669, 675 (8th Cir. *1995), reh'g en banc denied,* 1995 U.S. App. LEXIS 28274 (9th Cir. Oct. 11, 1995). Though a plaintiff clears this hurdle, "the district court [still] has wide discretion in making a fee award determination," *Phillip* v. *ANR Freight Sys., inc.,* 61 F.3d at 675.

ADEA OR LAW NO. 100

In a previous Opinion and Order, the Court stated that attorney's fees would be awarded either under Law No. 1 00's flat-rate approach or the Age Discrimination Employment Act's ("ADEA") "lodestar" method. In response to the Court's order to introduce accurate and reliable information on their claimed attorney's fees, Plaintiffs' filed a motion submitting time records (Dkt. 94). Defendants then filed their Opposition to those time records (Dkt. 101).

While each law provides for an award at attorney's fees, the two take divergent means in calculating the actual award in determining attorney's *fees* under Law 100, the Supreme Court of Puerto Rico has determined that "ordinarily, the amount that the attorney of a prevailing worker may receive under an Act No. 100 claim shall be twenty-five (25%) of the base compensation awarded to the worker." *Lopez-Vicil v. ITT Intermedia, Inc., 97* J.T.S. 104. 1250, 1254 (1997). "In other words, the reward is *25%* of the compensatory damages award before the award is doubled." *Ramos et al. v. Davis & Geck, et al., 976* F. Supp. 108, 109 (D.P.R. 1997), *aff'd by* 167 F.3d 127 (1st Cir. 1999) (citing *Lopez Vicil v. ITT Intermedia. Inc.,* 97 J.T.S. 104, at 1250 (June 26. 1997)). On the other hand, the Lodestar method, generally used under ADEA, is calculated by multiplying the total number of hours reasonably spent by the attorneys (and staff) by a reasonable hourly rate. See *Grendel's Den, Inc. v. Larkin,* 749 F. 2d *945, 950-51* (1st Ck. 1984). "The Court,

however, is not required to apply a percentage-based analysis. The Court is only required to ensure that the fee award be reasonable." *In re Washington Public Power Sys. Secs. Lit,* 779 F. Supp. *1056,* 1060 (D. Az. 1991).

After examining relevant case law, policy concerns, and practicality issues, the Court finds that ADEA's "lodestar" method to determine attorney's fees in this case is the more appropriate method.

Though by no means exhaustive, the following reasons are instructive *of* the Court's reasoning: (1) the case was brought to this Court (and the Court has jurisdiction) through the ADEA claim, (2) At trial, plaintiffs dropped their libel and slander claim after not introducing any evidence in support of it, and (3) ADEA's "lodestar" method will ensure that Plaintiffs' attorneys receive a fair award of attorney's fees.

REASONABLE HOURS

"To determine the number *of* hours reasonably spent, one must first determine number of hours actually spent and then subtract from that figure hours which were duplicative, unproductive, excessive, or otherwise unnecessary." *Grendel 's Den, 749* F.2d at 950. Plaintiffs time records list 1,195 hours spent by attorneys and paralegals on this case. (Dkt. *94)* Defendant contends that several of the listed hours are duplicative, excessive, and/or unnecessary. (Dkt. 101) Defendant's concerns focus on five (5) areas: (1) paralegal trips to the "U.S. District Court to verify slams of case and obtain docket report" as well as the overall rate of work performed by paralegals; (2) work related to expert witnesses and work related to an unsuccessful motion to compel; (3) the overall reasonableness of the rates charged for attorneys who worked on the case; (4) several individual incidents of duplicative, excessive or unnecessary billing; and (5) work related to Plaintiffs' non-existent libel and slander claim.[1]

1. KEEP ME INFORMED

According to Plaintiffs' time records, a paralegal trekked to the United States District Court's Clerk of Court's office to "verify status of case and obtain docket update" approximately 153 times over a three-year period, basically on a weekly basis. Plaintiffs introduced no reason why the case status and docket update needed to be checked weekly. The word overkill certainly jumps to mind. The deadlines in this case were not of a nature where a response was due overnight. While both parties frequently filed documents, the parties were required to receive copies of these documents. The Court therefore finds that these trips are duplicative, excessive and unnecessary, Plaintiffs' counsel should show better judgment than to bill for that many trips. The Supreme Court in *Hensley v Eckerharr,* 461 U.S. 424, 434 (1983), stated a prevailing party's duty well:

> Counsel for the prevailing party should make a good-faith effort to exclude from a fee request hours that are excessive, redundant, or otherwise unnecessary, just as a lawyer in private practice ethically is obligated to exclude such hours from his fee submission. "In the private sector billing judgment' is an important component in fee setting. It is no Less important here. Hours that are not properly billed to one's *client* also are not property billed to one's *adversary* pursuant to statutory authority" *Copeland v. Marshall,* 205 U.S. App. DC. 390, 401, 641 F.2d 880, 891 (1980) *(en banc)* (emphasis in original).

Consequently, the Court must remove all of the hours spent (57 ½) on these outings from the base hours of 1,195 hours[2], leaving 1137 ½ hours as the new base hour number.

Defendant also challenges the work done by paralegals under the headings of "case file organization" and "review of new documents received in order to update our pleadings file." The Court agrees with Defendant that hours billed under the heading of "review of new documents received in order to update our pleadings tile" must be subtracted as unnecessary. Twenty-nine-and-a-half (29 ½) hours must therefore be subtracted from the base hour total of 1137 ½ leaving 1108 hours. However, hours billed under the "case file organization" heading serve to aid the case management. While excess time spent under this category may be subtracted, the tasks themselves serves a plausible purpose. By maintaining an organized case file, attorneys work more efficiently.

2. EXPERT WITNESS WORK & THE DENIED MOTION TO COMPEL

Defendants next two contentions focus on an unsuccessful attempt to submit expert testimony and an unsuccessful motion, Defendant asserts that the forty-three-and-a-quarter (43 ¼) hours Plaintiffs' counsel billed for the time spent preparing and readying the expert testimony and the subsequently denied 'Plaintiffs' Motion to Compel Production of Documents and Supporting Memorandum" should be excluded. A closer look at the hours in question is necessary to answer this question.

On December 7, 1998, the Court granted Defendant's motion to exclude Plaintiffs' proposed expert testimony witness due to the untimely production of the expert's report and Plaintiff's noncompliance with discovery timetables. *See* Fed. R. Civ. P. 26(a)(A)(B) & (C). Defendants challenge the thirty-four (34) hours Plaintiffs' counsel spent working on or with the excluded expert testimony. However, on closer inspection, only three-and-a-half *(3.5)* hours are excludable.

The remaining thirty-one-and-a-half (30 ¼) hours must remain. These hours were spent securing and working with an expert testimony report that, though never allowed as testimony, provided aid and guidance in settlement and damage claims. It would be irresponsible for the Court to remove this work from the attorney's fees award, as it was a necessary and relevant endeavor.

On October 9, 1997, Plaintiffs filed "Plaintiffs' Motion to Compel Production of Documents and Supporting Memorandum." The Court referred the matter to Magistrate Judge Aida M. Delgado Colon, who issued an order denying Plaintiffs' request. Defendant now claims that the nine-and-a-quarter *(9.25)* hours spent for this work should be excluded, as it is unnecessary. An investigation of the hours reveals that of the nine-and-a-quarter (9 1/4) hours, only seven-and-a-quarter (7 ¼) may be excluded. Two (2) of the hours (from 4/1/97) are reasonable expenditures of time and energy, and thus are compensable.

After deducting ten-and-three-quarters (10 ¾ hours from the base hours, the total stands at 1097 ¼ hours.

3. REASONABLENESS OF ATTORNEY RATES

Defendant has broadly, and without support, challenged the rates listed by Plaintiffs. On their part, Plaintiffs' counsel has failed to supply any information in support of their proposed rates. For reasons of clarity and organization, this topic is discussed below.

4. DUPLICATIVE BILLING, DUPLICATIVE BILLING

"Time spent by two attorneys on the same general task is not.. . *per se* duplicative. Careful preparation often requires collaboration and rehearsal." *Rodriguez-Hernandez v.*

Miranda-Velez; 132 F.3d 848, 860 (V Cir. 1998). However, "[a]ttorney fees may also be reduced where overstaffing has taken place. *Pearson v. Fair[* 980 F2d 37, 47(1st Cir. 1992)] A court 'should ordinarily greet aclaim that several lawyers were required to perform a single set of tasks with healthy skepticism.' *Id* at 47, *quoting Lipsett v. Blanco, 975* F.2d 934, 938 (1st Cir. 1992)." *Velaquez Herndndez v. Morales,* 810 F. Supp. 25,28 D.P.R. 1992) (Peréz-Gimenez, J.). Moreover, attorneys "who charge high hourly rates [are] presumed to have expertise on the matter being litigated, therefore, he or she should generally need not the assistance of other attorneys in handling a case." *Id.* Plaintiff thus has the burden to "affirmatively prove that a plural number of attorneys was required to handle the case." *Id.* Defendant has challenged several areas of miscellaneous billing. First, Defendant contends that work, performed on 9/30/98 (two (2) hours) under the heading "Preparation of Letter to Adjuster of Seguros Triple S, Inc. to Complete Processing and Adjustment of Claim" is unrelated to the litigation. The Court agrees and deducts the two (2) hours from the base hour total (leaving 1095 ¼ hours).

Second. Defendant contends that the hours billed for the attendance of paralegals at the trial is duplicative, excessive, and unnecessary in view of the fact that Plaintiffs had two (2) attorneys representing them al all times. Defendant also contends that arrangements made with regards to the service of a subpoena for M. Gonzalez be excluded, along with an entry entitled "trip to U.S. District Court for the District of Puerto Rico to verify status of case and obtain docket update" which occurred the same day as the jury verdict. Defendant also contends that the billing entry entitled "Review Press Release to Columbus Dispatch and El Nuevo Dia" should be excluded. Except for one minor alteration, the Court agrees and deducts forty-three (43) hours from the base hour total (Leaving 1052 ¼ hours).[3]

Third, Defendant contends that Attorney Nigaglioni mistakenly entered two entries for the same day for the same work. However, a closer reading shows that the entries are in fact separate and distinct and the hours will not be excluded. In fact, this is precisely the method of recordation the Court prefers, for it is more specific and separates different classes of work.

Lastly, Defendant asserts that two (2) billing entries by the same attorney on each *5/1/96, 5/3/96,* and also 5/7/96 appear to be "practically identical" and "almost identical," and therefore duplicative. Plaintiffs' counsel has asserted that they have submitted correct time records and the Court has no reason not to believe them. The entries in question are allowable wider that theory. However, the second entry on 5/1/96 is excessive in the Court's view. The Court deducts five *(5)* hours from the base hour total, leaving 1047 ¼ hours.

5. UNSUCCESSFUL CLAIMS

"The court can segregate time spent on certain unsuccessful claims [as well as]. . . eliminate excessive or unproductive hours." *See Coutin v. Young & Rubicam P.R.. Inc.,* 124 F.3d 331,337(1st Cir. *1991).* "Counsel's time spent pursuing unsuccessful claims. . . is generally non-compensable 'unless it can be shown that the [unsuccessful and successful] claims were interconnected.' *Krewson* [v. *City of Quincy], 74* F.3d *[15,]* 19 [(1st Cir. 1996)]." *Koster v. Trans World Airlines, Inc.,* 181 F. F.3d 24, 33 (1st Cit. 1999). "Interconnection" may he found when the unsuccessful and successful claims include a "common core of facts or were based on related legal theories." *Lipsett* v. *Blanco,* 975 F.2d at 940. See *also Koster* v. *Trans World Airlines,* 181 F.3d at 38.

Beyond mere allegation, Defendant points the Court to no motion, brief, or other evidence where Defendant's time was wasted by the libel and slander claim. In Defendant's own

word: "Since plaintiffs failed to prevail on their libel and slander claim, which amounted to approximately fifty percent (50%) of their case, any forthcoming award of attorney's fees should be equally deducted/adjusted by such percentage." (Dkt. 101)

Plaintiffs did prevail on both their ADEA and Law No. 100 claims, recovering a substantial amount. Counsel for both sides ardently contested this case. The court is mindful that a party "should not [be] reward[ed] . . .for [a] vehement 'Stalingrad *defense.'" Rodriguez-Hernandez v. Miranda-Velez.* 132 F.3d 843, 860 (1st Cit. 1998). "Indeed, because a litigant's staffing needs and preparation time will often 'vary in direct proportion to the ferocity other adversaries' handling of the case, this factor weighs heavily in the balance.'" *Id.* It is Defendant's "burden to show a basis for segregability." *Koster* v. *Trans World Airlines, Inc.,* 181 F.3d at 38. Defendant did not sustain this burden. *See also Cabrales v. County of Los Angeles,* 935 F.2d 1050, *1053* (9th Cir. 1991) ("a plaintiff who is unsuccessful at a stage of litigation that was a necessary step to her ultimate victory is entitled to attorney's fees even for the unsuccessful stage"). The Court, though mindful of the libel and slander claim which was dismissed, declines to adjust Plaintiffs' counsel's fees, Plaintiffs were clearly successful and the prejudice of the libel and slander claim, if any, to Defendant was minimal.

REASONABLE HOURLY RATE

"In calculating reasonable hourly rate, one must consider such factors as the type of work performed, who performed it, the expertise that it required, and when it was undertaken." *Grendel's Den,* 749 F.2d 950-51. The First Circuit has established that "clerical or secretarial tasks ought not to be billed at lawyers' rates, even if a lawyer performs them." *Lipselt v. Blanco,* 975 F.2d 934, 940 (1st Cir. 1992). Thus, "[t]ime spent on clerical or secretarial tasks by attorneys

should be compensated at a rate commensurate with the nature of the tasks." *Massachusetts Dep't of Pub. Health* v. *School Comm. of Tewksbury,* 841 F. Supp. 449, 460 (D. Mass.1993). See *also Deary v. City of Gloucester,* 789 F. Supp. 61,66(0. Mass.l992), aff'd, 9 F.3d 191 (1st Cir. 1993); *McMillan* v. *Massachusetts Soc. for Prevention of Cruelty To Animals,* 140 F.3d 233, 308 (P Cir. 1998).

"In determining a reasonable hourly rate, the Supreme Court has recommended that courts use 'the prevailing market rates in the relevant community' as the starting point. *Blum v. Stenson, 465 US.* 886, 895 n.11 . (1984) (defining 'prevailing market rates' as 'those prevailing in the community for similar services by lawyers of reasonably comparable skill, experience, and reputation.')." Andrade v. Jamestown Hous. Auth., 82 F.3d 1179, 1190 (1st Cir. 1996), The reasonable hourly rate is therefore not "the amount that the party's lawyer might be paid by willing clients, but the amount that is normally paid in the community for similar services." *Id.*

In their submitted time records, Plaintiffs' counsel lists rates ranging from $80.00 (paralegal) to $275.00 (attorney). Defendant believes that a reasonable rate for a paralegal is $50.00 and a reasonable rate for attorneys ranges from $145.00 to $175.00. Neither party has submitted historical data to support their proposed fee rates. Fortunately, the Court is no stranger to attorney's fees and therefore takes judicial notice of the prevailing market rate for both attorneys and paralegals in the San Juan, Puerto Rico area. The Court will therefore calculate the lodestar based upon the following rates:

Group	Rates	
	From 6/98 to present	Up to 6/98
Paralegals	$50.00	$40.00-$45.00
Paralegal RQC	$70.00	$70.00
Attorneys Nigaglioni and Cespedes	$200.00	$175.00
Attorneys Arias and Melendez	$175.00	$150.00
Attorneys Noel, Calero Blanco and Antongiogi	$165.00	$140.00
Attorney Bellotti	$120.00	n/a

"As would be expected, hours that survive a first weeding may still be in need for further pruning; the mere fact that a lawyer performs a given task does not render the same compensable at the full hourly rate." *Veláquez Hernandez v. Morales,* 810 F. Supp at 27. The Court must "ascertain the legal skill involved in litigation of the case as well as the mental and emotional strain placed on counsel in the particular case." *Id. (citing Morales Feliciano v. Herndndez Colon, 697* F. Supp. 51, 59 (D.P.R. 1988) (Perer-Gimenez, J.). "For example,' . . an hour in court or brief drafting will be more valuable than fact finding tasks." *Id (citing Morales Feliciano v. Hernandez Colon,* 697 P. Supp. at *59).* Therefore, the Court shall divide the tasks performed by both the paralegals and the attorneys into three categories:

Attorneys:

Low: Reviewing documents; drafting and reading intra-counsel memoranda and letters; telephone calls; preparing for depositions; meetings with clients; conferences with co-counsel and adversaries; proofreading and copyreading. (Compensated *at* 60% of the attorney's rate).

Medium: General research; preparing subpoenas, interrogatories, answers to interrogatories, and affidavits; attending and taking depositions: tasks involving discovery; preparing for trial, court hearings, and conferences. (Compensated at 30% of the attorney's rate).

High: Preparing, drafting and revising motions and briefs; court and in-chamber appearances (Compensated at 100% of the attorney's rate).

Paralegals:

Low: Trips to United States District Court for filing or checking on case status; Conferences with attorneys; Case tile organization; Copying; deliveries; Document and file review; Retrieval of documents and other materials; Drafting and review of tellers; Telephone calls. (Compensated at 30% of paralegal's rate).

Medium: Preparation of pleadings; assisting in preparation of subpoenas; attending trial; and preparing draft of expenses. (Compensated at 100% of paralegal's rate).

High: General research. (Applies only to Paralegal RQC; compensated at 100% of rate).

CONCLUSION

The Court therefore awards Plaintiffs the amount of $141,826.25 for 1047 ½ billable hours, derived via the "lodestar" method, as attorney's fees. The Court has attached a more complete accounting of how these numbers were determined.

IT IS SO ORDERED.

San Juan, Puerto Rico, May 8, 2000.
ORDER OF COURT

Footnotes

[1] Defendant *also* alleged that Plaintiffs failed to (a) provide a justification for the hourly rate requested for the attorneys or paralegals, and (b) attest to the fact that the record of hours allegedly worked were contemporaneous, complete and reasonable. Though not required, Plaintiffs responded by filing a motion attesting that the time record; were in fact contemporaneous, complete and reasonable, The Court points out that neither party has offered any justification or historical data in support for any rate. Fear not, for the parties failures is saved by the Court's vast experience in awarding attorney's fees over the past 20 plus years.

[2] Though the time records submitted by Plaintiffs' counsel list 1196 ½ hours, the Court's count comes to only 1,195 hours and it is the latter number that the Court uses as the base hour figure

[3] Defendant asks the Court to exclude all of the seven-and-a-quarter (7 ¼) hours that Plaintiffs' counsel spent working on 12/16/98 wishes to exclude the whole seven-and-a-quarter (7 ¼) hours that counsel billed that day despite the fact that only one of the five (5) sub-entries from this day is excludable. Therefore, the Court, while excluding that time spent on the articles, leaves in that spent on worthwhile activities (6 ¼ hours).

Nos. 00-1453, 00-1741, 00-1742 and 00-2107

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

MANUEL A. BARALT, LIZETTE PENA-AVILES, CONJUGAL PARTNERSHIP BARALT-PENA; JUAN GONZALEZ-PEREZ, MONSERRATE CANABAL-DURAN PARTNERSHIP GONZALEZ-CANABEL, and their marital partnership,
Plaintiffs-Appellees/Cross-Appellants

v.

NATIONWIDE MUTUAL INSURANCE, CO,
Defendant-Appllant/Cross-Appellee,

NATIONWIDE MUTUAL FIRE INSURANCE CO., NATIONWIDE LIFE INSURANCE CO., NATIONWIDE GENERAL INSURANCE CO., NATIONWIDE PROPERTY AND CASUALTY INSURANCE CO., NATIONWIDE GROUP OF COMPANIES., and WILLIAM P. DEMENO,
Defendants

Before

Boudin, Chief Judge, Coffin and Campbell, Senior Circuit Judges, Torruella,* Selya, Lynch and Lipez, Circuit Judges.

ORDER OF COURT

Entered: August 24, 2001

The panel of judges that rendered the decision in these cases having voted to deny the petition for rehearing and the suggestion for the holding of a rehearing en banc having been

carefully considered by the judges of the Court in regular active *service* and a majority of said judges not having voted to order that the appeals be reheard by the Court en banc,

It is ordered that the petition for rehearing and the suggestion for rehearing en banc be denied.

By the Court

Footnotes

•Judge Torruella is recused from this matter.

[cc: Messrs: Nigaglioni, Arias-Larcada, Diaz-Angueira, Nahmod and Feliberti]